Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

BROWN HARRIS II, TRUSTEE
FOR THE CHRISTOPHER HARRIS TRUST,

Petitioner,

vs.

THE MISSOURI DEPARTMENT OF CONSERVATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the owner of a lake which is located in a larger tract of land in the same ownership is entitled to just compensation under the Fifth Amendment to the United States Constitution for the taking of the owner's property interests in the lake where the State, by regulation, prohibits commercial fishing the lake but does not regulate the surrounding property.

II. Whether the Courts of Missouri can deny just compensation to a property owner where a regulation substantially advances a legitimate state interest regardless of the impact of the regulation.

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District dated January 17, 1995 is reported at 895 S.W.2d 66 (Mo. App. 1995) and is reproduced in the Appendix. (App. at 1).

The order of the Missouri Supreme Court dated April 25, 1995 denying transfer is not reported and is reproduced in the Appendix. (App. at 16).

The opinion of the Circuit Court of Buchanan County, Missouri dated July 9, 1993 is not reported and is reproduced in the Appendix. (App. at 17).

An earlier opinion of the Missouri Court of Appeals, Western District in this case is reported at 755 S.W.2d 726 (Mo. App. 1988) and is reproduced in the Appendix. (App. at 64).

JURISDICTION

The judgment of the Missouri Supreme Court sought to be reviewed was entered April 25, 1995.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III, § 2:

> In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions

> and under such regulations as the Congress shall make.

U.S. Const. amend. V:

> No person shall . . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Construction of the Dam

On March 1, 1968, King Lake, Inc., a Missouri corporation, granted to the Soil and Water Conservation District of Dekalb County, an easement for the purpose of constructing a dam in the Grindstone-Lost-Muddy Creek Watershed located on King Lake, Inc.'s property. (Legal File at 125).[1]

[1] The record in this case consists of a Legal File (hereinafter "L.F."), a Trial Transcript (hereinafter "Tr."), and Exhibits (hereinafter "Ex.").

The dam was thereafter constructed across Lost Creek, creating a 230-acre private lake ("King Lake") situated in the middle of the 888-acre tract of land.

Control of Lake Size

King Lake, Inc. owned all land surrounding King Lake, including land up to at least the 100-year flood level. (Tr. 108). The dam was constructed with a drain. King Lake, Inc. was advised that it could drain King Lake at any time, and could, in fact, keep the lake drained. (Tr. 90). King Lake, Inc. could also regulate the drain so that under no circumstances would King Lake back up onto other property. (Tr. 109).

Control of Fishing

King Lake, Inc. regulated access to King Lake and issued its own private fishing permits. (Tr. 77). Although Conservation Department agents were regularly on the King Lake, Inc. property to inspect the take of fowl, the president of King Lake, Inc., Pete Manville, knew of no enforcement of the Department's fishing regulations on King Lake. Manville never saw a Conservation Department agent on the King Lake property during fishing season and had never been told that King Lake might be considered by the Missouri Department of Conservation to be "waters of the state." (Tr. 79, 81). Manville refused a Department offer to stock King Lake with fish because Manville did not want to grant public access to King Lake. (Tr. 80). The Department never issued a ticket for violation of its fishing regulations on King Lake until

1982, after King Lake, Inc. sold the property to Petitioner Harris. (Tr. 59).

Purchase by the Trust

In 1979, King Lake, Inc. sold King Lake and the surrounding property to the Christopher Harris Trust (the "Trust"). (L.F. 148-151). It was the design and goal of the Trust to develop the surrounding property and to stock and operate a commercial fishing venture on King Lake. (Tr. 207).

The Trust saw nothing which caused it to believe that the State of Missouri or the Department of Conservation was asserting any right to control the King Lake property. (Tr. 209). No exceptions in favor of the State of Missouri or the Department of Conservation appeared on the title insurance on the property. (Tr. 210-211).

In early May of 1983, the Trust notified the Department of its interest to commercially fish King Lake and sought the assistance and knowledge of the Department in undertaking the same. The Department regularly provides assistance, free of charge, to owners of bodies of water desiring to develop private or commercial fisheries. (L.F. 188-203). Brown Harris II, Trustee of the Trust, was advised by Department fisheries extension biologist Larry Belusz that the Trust could commercially fish King Lake if the Trust owned all the property around King Lake. (Tr. 255). Belusz also advised that the Department routinely provided chemical treatment for lakes (rotenone) to allow private lake owners to kill all existing fish and to start anew. (Tr. 513).

Application of the Regulation

The Department, however, later declared that King Lake was "waters of the state" and that under no circumstances could the Trust commercially fish King Lake. (L.F. 243-247).

The Department provided the Trust with a copy of the 1983 Wildlife Code and advised that under the Wildlife Code,

> (9) Fish, crayfish, salamanders and snapping turtles may be bought, sold, transported, propagated, taken and possessed by any person without permit throughout the year in any number or size and by any method providing: . . .
>
> (C) That the privileges of this section do not apply to taking or attempting to take, or to the possession of such animals in, on or from waters of the state, waters stocked by the state, or waters subject to the movements of fishes into and from waters of the state, except that fish, crayfish and salamanders possessed under provisions of this section may be possessed on the waters of the state for use as live bait.

3 CSR 10-4.110 (9)(C). "Waters of the state" is defined as:

> All rivers, streams, lakes and other bodies of surface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two or more persons jointly or as tenants in common and including waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which are subject to

> movement of fishes to and from waters of the state.

3 CSR 10-11.805(39). The Department admitted that King Lake had not previously been stocked by the Department. (Tr. 60).

Enforcement of Regulation and Purchase by Department

The Trust maintained that King Lake was not "waters of the state" and commenced efforts to begin a commercial fishery on King Lake by arranging for removal of the existing "rough" fish so that King Lake could be stocked with fish more appropriate for commercial sale. Thereafter, the Department caused a criminal charge to be instituted against Brown Harris, alleging the unlawful commercial fishing of King Lake. (L.F. 167-168). After causing the Trust to suspend its fishing operation, and knowing that such suspension would cause financial distress to the Trust, the Department offered to purchase the property including the Lake at a price below its fair market value. As a result of the financial distress the Department caused, the Trust was compelled to sell its property to the Department in order to avoid the loss of the entire equity therein through foreclosure. Accordingly, the Trust sold the property to the Department on June 15, 1984 for the sum of $750,000 in response to the Department's "take it or leave it," non-negotiable offer.

Litigation

The Trust filed suit against the Department on August 7, 1986 claiming inverse condemnation in violation of the Fifth Amendment to the United States Constitution. The Petition is reproduced in the Appendix. (App. at 47). The Department

responded with a motion to dismiss which was granted by the trial court. On August 16, 1988, the Missouri Court of Appeals, Western District filed its Opinion reversing the trial court and remanding the case for trial. *Harris v. Department of Conservation*, 755 S.W.2d 726 (Mo.App. 1988). (App. at 64).

On remand, the Trust filed its First Amended Petition which, among other claims, again raised the constitutional questions for which Petitioner is currently seeking certiorari. The First Amended Petition is reproduced in the Appendix. (App. at 52). The trial court bifurcated the issues for trial, ordering that the legal issue of whether the Department was liable to the Trust for a taking of property without just compensation be tried to the court, and that if the Trust prevailed, the issue of damages would be tried to a jury. The trial court, after hearing evidence on liability, entered judgment for defendant. (App. at 46).

The Missouri Court of Appeals, Western District, affirmed ruling that an unconstitutional taking did not occur because the Department's regulation substantially advanced a legitimate state interest and applied only to the 230-acre lake and not to the surrounding property. (App. at 14-15). On April 25, 1995, the Missouri Supreme Court entered its Judgment refusing to accept transfer of this case. (App. at 16).

REASONS FOR GRANTING THE WRIT

In this case, the Missouri Supreme Court decided that: 1) the State's confiscation of the right to commercially fish a 230-acre lake was not a taking without just compensation in violation of the Fifth Amendment to the United States Constitution because the petitioner also owned a larger, 888-acre

tract of land in which the lake was located, and 2) no taking can occur where a regulation substantially advances a legitimate state interest. Point 1 decides an important question of federal law not previously addressed by the United States Supreme Court. Point 2 decides a federal question in conflict with applicable United States Supreme Court decisions.

I. THE FACTS OF THIS CASE DEMONSTRATE THE NEED OF A UNITED STATES SUPREME COURT DECISION THAT DESCRIBES THE SPECIFIC PROPERTY INTERESTS ON WHICH THE COURTS SHOULD FOCUS WHEN DETERMINING THE ECONOMIC EFFECT OF GOVERNMENT REGULATION.

A. The United States Supreme Court Has Not Decided a Case That Defines the Appropriate "Denominator" Where Less Than All Of An Ownership Is Alleged To Have Been Taken.

A taking in violation of the Fifth Amendment results when a regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 2894, 120 L.Ed.2d 798 (1992) (quoting *Agins v. City of Tiberon*, 447 U.S. 255, 260 (1980)) (emphasis in original). Justice Scalia, writing for the Court in *Lucas*, however, commented on the uncertainty that is currently present in regulatory takings jurisprudence.

> [r]egrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to

> leave 90% of a rural tract in its natural state, it is unclear whether we should analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or is one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas, 112 S. Ct. at 2894, n.7. The majority in *Lucas* then recognized that the lack of a Supreme Court decision on this issue has resulted in inconsistent decisions.

> Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 160, 67 L.Ed. 322 (1922) (law restricting subsurface extraction of coal held to effect a taking) with *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497-502, 107 S. Ct. 1232 1248-1251, 94 L. Ed. 2d 472 (1987) (nearly identical law held not to effect a taking); see also, *Id.*, at 515-520, 107 S. Ct. at 1257-1260 (Rehnquist, C.J., dissenting); Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle*, 57 S.Cal. L. Rev. 561, 566-569 (1984).

Id.

Despite the discussion of the "denominator" problem, the Court in *Lucas* was not called upon to decide the question.

> In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of

> Common Pleas found that the Beach-front Management Act left each of Lucas' beach-front lots without economic value.

Id.

B. The Lower Federal Courts Have Recognized the Importance of the Question of Federal Law that this Case Presents.

The Court in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) framed the "denominator" problem as follows:

> In the facts of the case before us, the question of whether there has been a partial or total loss of economic use . . . depends on what is the specific property that was affected by the permit denial. If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land that for which the permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the wetlands regulation, then either a partial or no taking occurred. . . . This is the denominator problem.

Id. at 1180.

After reviewing all of the potential denominators, the Court in *Loveladies* admitted that:

> This array of possible denominators bears out the Lucas Court's observation that "the rhetorical force

> of [the] 'deprivation of all economically feasible use rule' is greater than its precision."

Id. at 1180-1181 (quoting *Lucas*, 112 S. Ct. at 2894, n.7).

Similarly, in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) both the majority and the dissent made reference to the debate surrounding takings jurisprudence in the wake of *Lucas*. The majority opinion states that "[h]ow to determine whether a regulatory taking under the Fifth Amendment has occurred is a subject of ongoing debate."[2] The dissent likewise noted that:

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[2] The majority cited the following literature on the subject. Among symposia and significant individual contributions in the last year are: Richard Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 Denv. U. L. Rev. 437 (1993); *Catholic University Law Review: United States Court of Federal Claims Symposium*, Cath. U. L. Rev. 717 (contributions by James E. Brookshire, Dennis J. Coyle, John A. Humbach, Glynn S. Lunney, Jr., George W. Miller & Jonathan Abram, and Loren A. Smith) (1993); David Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. Land Use & Envtl. L. 285 (1993); *Northwestern School of Law of Lewis and Clark College: A Colloquium on Lucas*, 23 Envtl. L. 869 (contributions by Michael C. Blumm, William Funk, James L. Huffman, Donald Large, Edward Sullivan, and Lawrence Waters) (1993); Jeb Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993); *Stanford Law Review: Symposium on Lucas v. South Carolina Coastal Council*, 5 Stan. L. Rev. 1369 (contributions by Richard Epstein, William W. Fisher, Richard Lazarus, and Joseph L. Sax) (1993); *Windfalls and Wipeouts: Environmental Regulation, Property, and the 'Takings' Clause after Lucas v. South Carolina Coastal Council*, 17 Vt. L. Rev. 645 (1993); Walker, *Common Law Rules and Land Use Regulations: Lucas and Future Takings Jurisprudence*, 3 Seton Hall Const. L. J. 3 (1993).

> no legal subject has received the attention of scholars more than "takings" jurisprudence in recent years. A flood of literature has been produced advocating various theories of property and social responsibilities.[3]

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[3] As examples, the dissent cites the following literature. J. Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993); Glenn Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 Virginia Env.L.J. 439 (1993); Erika Jones et al., *The Fifth Amendment's Just Compensation Clause: Implications to Regulatory Policy*, 6 Adm.L.J. of American U. 674 (1993); Hon. John M. Walker, *Common Law Rules and Land Use Regulations: Lucas and Future Takings Jurisprudence*, 3 Seton Hall Const. L. J. 3 (1993); Richard Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369 (1992); William W. Fisher III, *The Trouble with Lucas*, 45 Stan. L. Rev. 1393 (1992); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433 (1992); Richard J. Lazarus, *Putting the Correct Spin in Lucas*, 45 Stan. L. Rev. 1411 (1992); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299 (1989); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630 (1988); William A. Fischel, *Introductions: Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581 (1988); Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600 (1988); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667 (1988); Susan Rose Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982); Frank Michelman, *Property, Utility, and Fairness: Comment on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165 (1967).

C. The Facts of the Case at Bar and the Law of Property in Missouri Present the Court with the Ability to Resolve this Important Question of Federal Law.

The property at issue in this case is a 230-acre lake located in a larger, 888-acre tract of land. The Missouri Department of Conservation designated the lake as "waters of the state" thereby prohibiting Petitioner from commercially fishing the lake. By denying appellate relief, the Missouri Supreme Court adopted the holding of the Missouri Court of Appeals, Western District, as the law of the State of Missouri. The opinion below states:

> Basically, the rule is as follows: where a land-owner has a full "bundle" of property, the loss of one "strand" of the bundle is not a "taking" because a majority of the property remains. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).
>
> Trust was not denied all economic use of the property, as there was evidence the commercial fishing use was only a small portion of the use of the property.
>
> The denial of the commercial fishing on King Lake was not the denial of all economic use of the Trust's property, meeting the standards of *Keystone* and *Andrus* respectfully. Thus, there was no compensable "taking."

Harris v. Department of Conservation, 895 S.W.2d 66, 73 (Mo. App. 1995) (App. at 1).

In the case below, the Department argued and the court agreed that the proper "denominator" was the entire 888-acre tract owned by Petitioner and that no

taking should be found because the Department regulated only the lake and not the other 658 acres owned by Petitioner.

Petitioner, on the other hand, maintained that the 230-acre lake is the appropriate denominator so that the Department's designation of the lake as "waters of the state" deprived Petitioner of all economically viable use of the property the Department regulated.

The facts of this case, therefore, fit squarely within the hypothetical the *Lucas* majority raised, but was unable to decide. See *Lucas*, 112 S. Ct. at 2894, n.7.

Although this Court in *Lucas* did not decide the denominator problem, the majority noted a possible solution.

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 112 S. Ct. at 2894, n.7.

In Missouri, the right to use a lake, and in particular, the right to fish a private lake is a property interest that is entitled to judicial protection. The court in *Dennig v. Graham*, 59 S.W.2d 699 (Mo.App. 1933) stated that:

> In the case of a private fishery a peculiar situation prevails. The chief and only practical value of such a property lies in its value as a private

> fishing reserve . . . . Plaintiff maintains the property as a private fishing place and for no other purpose. He surely has a right to have such property interests protected.

Id. at 703. In *Bohanan v. Camden Bend Drainage District*, 208 S.W.2d 794 (Mo.App. 1948) the court recognized destruction of a commercial fishing lake can result in a compensable taking. Specifically, the court noted that if the drainage district carried out its plan to drain the lake,

> [t]he result will constitute a taking of plaintiff's proprietary interest in the lake or the water thereof, which taking is prohibited by the Constitution until compensation is made therefore.

Id. at 801. *See also City of Blue Springs v. Central Development Association*, 831 S.W.2d 655, 659 (Mo.App. 1992) (the right to use water is a conveyable property interest). Because the specific property interest which is being regulated in this case is historically protected in Missouri, this Court can decide the present case on the merits without a remand to determine if the regulated property interest is protected under state property law. Unlike the circumstances in *Lucas* which involved the alleged confiscation of all of the landowner's property, Petitioner here has both a specific and protected property interest that is being regulated (the lake) and the remaining property in the 888-acre tract that is not being regulated.

Accordingly, the facts of this case as well as Missouri's law of property present a unique opportunity for the Court to put to rest the ongoing debate and uncertainty resulting from the lack of a Supreme Court decision on the denominator problem.

II. THE JUDGMENT OF THE MISSOURI SUPREME COURT CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

The opinions of this Court establish that the Fifth Amendment is violated when a regulation either: (1) does not substantially advance legitimate state interests or (2) denies an owner economically viable use of his land. *Agins v. City of Tiberon*, 447 U.S. 255, 260 (1980); *Lucas*, 112 S. Ct. at 2894. Thus even if a regulation substantially advances a legitimate state interest, the regulation effects a taking if the regulation denies an owner economically viable use of his land.

In *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1994) the court discussed this Court's two-pronged takings rule.

> Relying primarily on *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), the government argues that SMCRA'S AVF prohibition effected no taking because it was aimed at a public purpose entitled to "deference." Nothing in *Keystone*, however, supports the notion that public purpose alone permits total destruction of property rights without compensation. The government simply ignores *Keystone's* analysis: regulation effects a taking if it either (1) "does not substantially advance legitimate state interests," or (2) "denies an owner economically viable use of his land."

Id. at 1174-1176. *See also Florida Rock Industries, Inc., supra*, 18 F.3rd 1560, 1571 (government not excused from liability where regulation pursues important public purpose because to so hold would eviscerate the plain language of

the takings clause and would be inconsistent with Supreme Court guidance).

Contrary to the decisions of the United States Supreme Court, the Missouri Supreme Court will not find a taking so long as the regulation advances a legitimate state interest regardless of the regulation's impact. The opinion below held:

> Because it has already been held that the State regulation in question here advances legitimate State interests, under the United States Supreme Court ruling in *Keystone Bituminous Coal Assn.*, 480 U.S. at 492, (1987), where the regulation advances legitimate state interests, . . . no 'taking' has occurred. And because no 'taking' has occurred, no recovery is permitted under the Fifth Amendment's 'taking' clause.

Harris, 895 S.W.2d at 73. The takings rule adopted in Missouri, therefore, directly conflicts with controlling United States Supreme Court precedent.

Petitioners respectfully suggest that the Petition for Writ of Certiorari should be granted to review the judgment of the Supreme Court of the State of Missouri and decide the important questions of federal law that this

case squarely presents to the United States Supreme Court.

Respectfully submitted,

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APPENDIX

NOTICE

THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE ISSUED AND RECEIVED.

(SEAL)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BROWN HARRIS II, Trustee for the Christopher Harris Trust, Appellant, v. THE MISSOURI DEPARTMENT OF CONSERVATION, Respondent.	Case WD 48200 Opinion Filed: January 17, 1995 077787

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
Honorable Randall R. Jackson, Judge

BEFORE ULRICH P.J., LOWENSTEIN and HANNA, JJ.

This is an appeal from the circuit court's denying damages in an inverse condemnation action. A trustee for the Christopher Harris Trust (Trust), brought this suit when the defendant, The Missouri Department of Conservation (Department), prohibited commercial fishing on a lake located on Trust's property. At the heart of the case is the effect of enforcement of a regulation which prohibits

commercial fishing on what is denominated as a waterway of the state.[1] As will be discussed *infra*, "commercial fishing" of a state waterway is generally prohibited by Missouri's conservation laws. Appellant-Trust, sought a declaration that King Lake, being solely on Trust's property, was not a "water of the state," and it could have the fish from that lake commercially harvested. The trial court held against the Trust, disagreeing with the Trust's theory that the effect of the enforcement of the Department's regulation was a taking and entitled Trust to damages.[2]

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[1] As set out in Footnote 3, and as pertinent here, "waters of the state" include streams which are subject to the movement of fish to and from other waters of the state, and waters of the state do not include bodies of water completely confined on a landowner's property.

[2] The Department's authority to act as a state agency is set out on pgs. 728-29 of ***Harris v. Missouri Department of Conservation, supra.***

> **Missouri Const. Art. IV § 40(a).** "The Commission may acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for its purpose. . . . " Mo. Const. Art. IV, § 41. Missouri statutes create a department of conservation to be headed by the conservation commission. § 252.002.1, R.S.Mo.1986. All powers, duties and functions of the conservation commission have been transferred to the department of conservation. **§ 252.002.2.**
>
> In the same chapter, ownership and title to all wildlife of and within the state is declared to be in the State of Missouri. **§ 252.030.** A person who fails to comply with or violates this law or any such rules and regulations does not acquire any title, ownership or possessory right in wildlife, and any person pursuing, taking, killing, possessing or disposing of wildlife is

Many of the facts here were set out in the opinion following the earlier grant, by a different judge, of a motion dismissing the petition. In ***Harris v. Missouri Department of Conservation*, 755 S.W.2d 726 (Mo. App. 1988)**, this court reversed and remanded, ordering a trial to determine whether Department's actions showed some valid governmental purpose or interest. ***Id.* at 731.** This appeal follows the trial.

The property in question is King Lake, a lake of 230 acres in size, located primarily within DeKalb County, with its basin extending into Gentry County. King Lake was created in 1969 by the damming of Lost Creek, a small stream flowing through Gentry and DeKalb Counties. The lake is a conservation lake designed to control soil erosion. Lost Creek originates about two miles above, and flows into King Lake. The creek continues below King Lake, being fed by overflow from a spillway at the dam between the creek and the lake, and eventually reaches the Grand which flows into the Missouri River. The actual basin of King Lake at normal pool extends into Gentry County. At maximum flood pool, King Lake grows to 448 acres and will encroach on the property of many other landowners. Lost Creek and nearby Willow Creek are intermittent streams which sustain fish populations. Prior to and during the time Trust owned King

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deemed to consent that title to the wildlife remains in the State of Missouri for purposes of control, management, restoration, conservation and regulation. *Id.* No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by the rules and regulations. § 252.040. Wildlife includes fish. § 252.020(3).

Lake, fish did move from Lost Creek to King Lake and then back to Lost Creek. King Lake, Inc. developed the lake in 1969. Trust purchased it in early 1980 for $621,000.

When Trust purchased King Lake, the trustee contemplated various economic uses for the property, including a possible golf course, housing development, and electric generation. Although no formal plats or development plans were made, Trust acknowledges having several discussions with various developers about possible development of the land. Trust also used King Lake as a source of irrigation for the surrounding crop land. Before Trust purchased King Lake, there was no commercial fishing of King Lake. During the first year of ownership of King Lake, Trust did not commercially fish or develop plans to commercially fish the lake. This was the case for the first several years of Trust's ownership of King Lake. It was not until May or June of 1983, when Trust had a conversation with commercial fisherman, Jackie Shields, that arrangements were made to commercially fish the lake.

Also, in May or June of 1983, Department reported to Trust that there could be **no** commercial fishing of King Lake. Department mailed Trust a copy of the Wildlife Code containing the "waters of the state" definition. Nevertheless, Trust continued commercially fishing King Lake. A routine investigation of King Lake by Department revealed that commercial fishing was indeed taking place, and commercial fisherman Jackie Shields admitted to the fishing. Shields was fined $300.00 for commercially fishing King Lake.

In 1984, Trust requested Department purchase King Lake from it. Department did purchase the lake at a price of $750,000. Department did not stock the lake prior to its purchase in 1984. There is, and was, habitat for fish both above and below King Lake in Lost Creek.

After the purchase of King Lake by Department, Trust filed suit against Department in 1986, claiming inverse condemnation. The thrust of the suit is that Department's arbitrary rulings forced Trust to lose money and not meet its payments on the deed of trust for the land; thus, forcing Trust to sell (albeit at a profit), which amounted to a forced taking without proper compensation. ***Harris v. Department*, 755 S.W.2d at 727.** Because of the court's ruling on the question of whether King Lake is a "water of the state," the question of the ability of a former landowner to sell land to the state at a profit is not further addressed.

Points on Appeal

Trust presents a total of five points on appeal. They are as follows: 1) King Lake was totally enclosed in single ownership by Trust; thus, Department had no right to prohibit commercial fishing of the lake; 2) Department had no power to promulgate a regulation involving waters "subject to the movement of fishes," because such a regulation is unconstitutionally vague and there was no evidence of movement of fishes in King Lake; 3) Department's ban against commercial fishing serves no legitimate public interest; 4) The ban constituted a Fifth Amendment "taking," because it denies Trust all commercial use of King Lake property; and 5) As a result of the

"taking," Trust is entitled to monetary damages from Department.

Standard of Review

Trust challenges the findings of the trial court made in the course of rendering its judgment. Therefore, review will be under the abuse of discretion standard. The trial court's judgment may only be reversed if "there is no substantial evidence to support it, if the decision is against the weight of the evidence, or if the judgment erroneously declares or misapplies the law." ***Swall v. Custom Automotive Services, Inc.*, 831 S.W.2d 237, 239 (Mo. App. 1992) citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976)**.

Property Enclosure/Single Ownership

Trust's first point on appeal states that because King Lake was totally enclosed in single ownership, Department had no right to prohibit commercial fishing in the lake. Trust claims this is because a totally enclosed lake can't be "waters of the state."[3]

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[3] 3 C.S.R. 10-11.805(39) states as follows:
WATERS OF THE STATE: All rivers, streams, lakes and other bodies of surface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two or more persons jointly or as tenants in common and including waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which

As stated in ***Harris v. Department*, 755 S.W.2d at 729**, the definition of "waters of the state" **excludes** certain waters which are entirely confined and located completely upon land owned or leased by a single person. Such is not the case here. The record supports the trial court's finding that King Lake was not entirely confined to one area of ownership. The lake boundaries extend into a neighboring county, and at full flood pool, King Lake extends onto several parcels of land owned by others in Gentry County. Therefore, King Lake falls squarely subject to the Department's rules and regulations concerning "waters of the state," bodies of water, thus falling under the jurisdiction of Department. In addition, even if Trust were able to prove single ownership or total enclosure of King Lake, the lake would still be a "water of the state" under **3 C.S.R. 10-11.805(39)** because it is subject to the movement of fishes, as discussed in the next point.

The point is denied.

Constitutionality of Regulation

Under this point, Trust attacks the regulation in question, ***supra n.3,*** over the language at the end which designates as a water of the state any "waters . . . which are subject to movement of fishes to and from waters of the state." This language would make King Lake a water of the state, even if it were on land under single ownership. Even though the court has already affirmed the trial

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are subject to movement of fishes to and from waters of the state.

court's ruling on the single ownership issue, the Trust's second point will be examined.

1) The first argument is the "movement of fishes" language went beyond the rule-making authority of Department, since the legislature has already defined "waters of the state" in **§ 644.016(15), R.S.Mo. Cum. Supp. 1993.** (This statute, part of the Clean Water Law dealing with water pollution under Chapter 644, does not add anything to the definition about movement of fishes.)

Under **§ 252.030, *supra,*** Department is granted rule-making authority over fish under the Wildlife Code. That a different statutory definition is described in the Water Pollution chapter does not limit Department's regulation making authority. ***Missouri Hospital Association v. Missouri Department of Conservation Affairs, Regulation and Licensing,* 731 S.W.2d 262, 264 (Mo. App. 1987).**

2) Even if there was authority to promulgate the rule, Trust alleges the rule is still unconstitutionally vague.

Trust points to ***Dallen v. Kansas City,* 822 S.W.2d 429, 435 (Mo. App. 1991)** as holding persons of common intelligence would not be able to look at King Lake and realize that it is a "water of the state."

In ***Reid v. Ross,* 46 S.W.2d 567 (Mo. 1932),** the Supreme Court of Missouri adjudicated the constitutionality of what was the precursor to the current "water of the state" regulation. In ***Reid,*** the landowner owned a large lake which was connected to the Missouri River by only a thin drainage ditch. The lake and the river were only connected 12 days per year but when they were

connected, fish could pass between the two. The Supreme Court determined the "waters of the state" regulation was clear and not unconstitutionally vague and that the fish coming from the privately owned lake were subject to the state's regulation.

Reid is very closely akin to the situation at bar. There is ample evidence on record that fish move from King Lake to Lost Creek and vice versa. There is also ample evidence that King Lake and Lost Creek are connected bodies of water at least a few days per year. The fish in King Lake are fish that came from other bodies of water. Furthermore, the evidence at trial demonstrated at the time the Trust purchased King Lake: (a) the trustee knew that the lake contained wild fish; (b) King Lake was connected a significant portion of the year to Lost Creek and Willow Creek above King Lake; (c) fish commonly move about within connected bodies of water; (d) overflows regularly occurred out of King Lake into Lost Creek downstream and that fish escaped from King Lake into Lost Creek; and (e) Lost Creek and Willow Creek were totally typical northwest Missouri streams, sustaining within them typical wild fish species observed and abundant throughout the watershed in similarly situated streams. And, as in ***Reid,*** the trial court in this case concluded that Trust had constructive notice of the regulation, and had all the information necessary to determine whether King Lake was affected by the regulation at issue. In addition, the trial court concluded a person of ordinary intelligence could read the ordinance and understand what conditions must be met in order for a body of water to be considered "waters of the state" and if King Lake qualified as a "water of the state."

3) Trust finally claims the trial court erred in finding that King Lake was "subject to the movement of fishes" from Lost and Willow Creeks.

In reviewing evidence, the factual findings of the trial court are to be accorded great deference and are to be upheld if there is any evidence to support them. ***Swall v. Custom Automotive Services, Inc.*, 831 S.W.2d 237, 239 (Mo. App. 1992).** In reviewing the factual findings as reported in the trial court's ruling, the following evidence exists: 1) prior to and during the time Trust owned King Lake, fish could and did move to and from King Lake into Lost Creek above King Lake, and out of King Lake into Lost Creek; and 2) the fish found in King Lake during the time it was owned by Trust were native fish which originated in Lost Creek. The evidence lends itself to the conclusion that King Lake is subject to the movement of fishes.

The point is denied.

Regulation Protects Legitimate State Interest

The third point asserts the "waters of the state" regulation serves no legitimate state interest and, as such, is void. Trust claims Department cannot sustain an argument that a ban on commercial fishing is justified in order to prevent loss of existing fish in King Lake.

Trust relies on ***Agins v. City of Tiberon*, 447 U.S. 255, (1980)** which sets forth the conditions under which a "taking of property may occur." Under ***Agins***, the ordinance or regulation in question can be found to effect a taking if it does not substantially advance legitimate state

interests. *Id.* **at 260.** Regulations are a valid exercise of state power and are constitutional unless clearly arbitrary and unreasonable, meaning they have no substantial relation to public health, safety, morals or general welfare. ***Agins*, 447 U.S. at 260, citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).** *Agins* goes on to hold that the test essentially involves a weighing of public and private interests. *Id.* **at 260.**

The trial court applied the facts ascertained at trial to the standards of *Agins* and made specific findings in regards to the interests furthered by the regulation. These specific factual findings are to be accorded due deference by this court and will be upheld absent an abuse of discretion. ***Swall*, 831 S.W.2d at 239.**

The trial court found several state interests were served by the regulation. They are as follows:

> 1. The court finds and concludes that the evidence adduced by the Department of Conservation at trial demonstrated that the public's interest in the control, management, conservation and regulation of fish and wildlife is advanced and furthered by the rules and regulations issued by the Department,. . . .
>
> 2. The court finds and concludes that the "waters of the state" regulation makes clear the Department's jurisdiction over those bodies of water comprising as a whole the hydrologic system of the State of Missouri and in which the fish of Missouri are to be found. Substantial interest of the State of Missouri are served [sic] by the application of the "waters of the state" regulation to

situations where there is movement of fishes to and from "waters of the state" including; (i) enforcement of the state's rights in fish titled in the state, (ii) prevention of spread of disease in fish populations, (iii) prevention of the spread and resulting proliferation of exotic species of fish in the hydrologic system managed by the state of Missouri, and (iv) maintenance of proper fish populations throughout the connected waterways.

3. The court concludes that the "waters of the state" regulation reasonably promotes the objectives of the regulatory scheme of the Department of Conservation and the "water of the state" regulation in particular. Missouri has specifically upheld and found constitutional fishing laws which classify territory, permitting fishing on one stream or in one territorial area and denying it in others. ***State v. Terrell,*** **303 S.W.2d 26 (Mo. 1957).** Such classification is permissible if the court finds and concludes that reasonable grounds exist for such classifications, and this court does so conclude. The regulation reasonably includes bodies of water which are not entirely confined and located completely upon lands owned by a single person, and also reasonably includes water which have been stocked by the state or which are subject to movement of fishes to and from other waters of the state. This court finds and concludes that it is reasonable that bodies of water so defined, should be subject to regulation by the Missouri Department of Conservation.

In addition, the trial court also found that the regulation advanced the following legitimate state interests **as applied** to King Lake:

> 1. The court finds that Lost Creek and Willow Creek above King Lake sustained native fish populations and that such fish populations were the source of the fish to be found in King Lake during the time it was owned by the Harris Trust. The court further finds that the fish populations of King Lake move freely into Lost Creek and Willow Creek and that fish populations routinely moved out of King Lake downstream. The court concludes that the fish in King Lake, at the time the Harris Trust owned it, were wild fish titled in the state of Missouri, that such fish were not confined to King Lake, that legitimate state interest existed and exist in controlling, managing, conserving and regulating those fish, and that the "waters of the state" regulation further advances those state interests.

Giving due deference to the trial court's factual findings, it is now proper to conduct an *Agins* balancing test. According to the evidence on the record, the public interest served here is the "control, management, restoration, conservation and regulation of the . . . fish . . . and wildlife resources of the state." **Art. IV, §§ 40-46** of the **Missouri Constitution** mandate such public interests be met and advanced.

There was a valid state interest shown here in not allowing commercial fishing on King Lake. The public interest is served by protecting the number of fish harvested in King Lake. "A land use regulation reasonably related to promotion of the general welfare will not be

deemed a 'taking' just because there has been a diminution of property value." ***Penn. Central,* 438 U.S. 104, 133 (1978).** Under these circumstances, there can be no conclusion of a compensable taking. ***Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141 (1987).**

The point is denied.

Use of Regulation Not a "Taking"

Trust's final contention is that a "taking," entitling Trust to damages, occurred when Department banned commercial fishing in King Lake because the application of the regulation denies Trust **all** commercial use of King Lake.

Because it has already been held that the state regulation in question here advances legitimate state interest, under the United States Supreme Court ruling in ***Keystone Bituminous Coal Association,* 480 U.S. at 492, (1987),** where the regulation advances legitimate state interests, . . . no "taking" has occurred. And because no "taking" has occurred, no recovery is permitted under the Fifth Amendment's "taking" clause.

Nevertheless, even if Trust wanted to prove all commercial use was denied by the regulation, the burden of proof is heavy on Trust to prove **all** economic use was denied. ***Keystone* at 130-31.** This Trust cannot do. Basically, the rule is as follows: where a landowner has a full "bundle" of property, the loss of one "strand" of the bundle is not a "taking" because a majority of the property remains. ***Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).**

Trust was not denied all economic use of the property, as there was evidence the commercial fishing use was only a small portion of the use of the property.

The denial of the commercial fishing on King Lake was **not** the denial of all economic use of Trust's property, meeting the standards of ***Keystone*** and ***Andrus,*** respectively. Thus, there was no compensable "taking."

Because this court held no "taking" occurred under the Fifth Amendment, no damages are due Trust.

The point is denied.

The judgment is affirmed.

_____

Harold L. Lowenstein, Judge

All concur.

IN THE SUPREME COURT OF MISSOURI

No. 77787
W.D. No. 48200

January Session, 1995

Brown Harris II, Trustee for
the Christopher Harris Trust, Appellant,

vs. (TRANSFER)

Missouri Department of Conservation, Respondent

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1995, and on the 25th day of April, 1995, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of April, 1995.

/s/ Thomas F. Simon Clerk

/s/ _____ D.C.

**IN THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI
DIVISION 1**

BROWN HARRIS II, Trustee for the Christopher Harris Trust, Plaintiff,	)	
v.	)	Case No. CV387-538CC
THE MISSOURI DEPARTMENT OF CONSERVATION, Defendant.	)	

**JUDGMENT WITH
FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

The above captioned case came on for hearing before the Court on November 30, 1992, and December 1, 1992. The parties agreed that the issue of whether a compensable "taking" had occurred was a non-jury issue to be determined from the evidence by the Court. The parties further agreed that if the Court found that such "taking" had occurred, a later jury trial would be conducted for the determination of plaintiff's damages. Evidence was heard and the Court took the matter under advisement. A briefing schedule was set and later extended by agreement of the parties.

Plaintiff and defendant having submitted to the Court the matters in controversy and upon the pleadings and the evidence adduced and the final post trial briefs having been submitted by the parties on April 20, 1993, the court, being duly advised in the premises, now on this 9th day of July, 1993, makes the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. The plaintiff is Brown Harris II, who is and was at all times herein mentioned, Trustee for the Christopher Harris Trust ("the Harris Trust"), a private trust created by Christopher Harris prior to his death.

2. The defendant is the Missouri Department of Conservation. The Missouri Department of Conservation was created by the Missouri Legislature by §252.002 RSMo.

3. King Lake is a lake approximately 230 acres in size located primarily within DeKalb County with its basin extending into Gentry County, Missouri. The principal portion of the lake is located within a 888 acre tract of land located in DeKalb County, Missouri.

4. King Lake (including the surrounding tract of land) is currently owned by defendant Missouri Department of Conservation.

5. The Harris Trust had purchased King Lake and the surrounding tract of land in DeKalb County from King Lake, Inc. in February of 1980 for the sum of Six Hundred Twenty-one Thousand Dollars ($621,000.00).

6. The Missouri Department of Conservation purchased King Lake and the surrounding tract of land in DeKalb County from the Harris Trust on June 15, 1984 for the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

7. King Lake was created pursuant to an agreement between Grindstone-Lost-Muddy Creek Watershed District and King Lake Inc.

8. King Lake itself was created in late 1969 and early 1970 by the damming of Lost Creek, a natural Missouri stream flowing through Gentry and DeKalb Counties, Missouri.

9. King Lake is a soil conservation lake and is a part of the Grindstone-Lost-Muddy Creek Watershed District located in Northwest Missouri. As a soil conservation lake, King Lake was designed to control soil erosion within the watershed district.

10. Lost Creek, which originates approximately two miles above King Lake, flows into King Lake. Willow Creek is a natural Missouri stream which is the main tributary of Lost Creek and flows into Lost Creek above King Lake. Lost Creek continues below King Lake, is fed by overflow from King Lake and eventually reaches the Grand River which flows into the Missouri River. Willow Creek is a water of the state. Lost Creek both above and below King Lake is a water of the state.

11. The dam which created King Lake contains a "drop tube" as well as an overflow spillway to release water. Any such water flowing out of King Lake through the drop tube or the overflow spillway flows into Lost Creek below the dam.

12. Prior to the construction of the dam which created King Lake, the watershed district obtained easements from surrounding land owners in both DeKalb and Gentry Counties, Missouri. The purpose of such easements is to protect the watershed district from future complaints or litigation by landowners based on the fluctuating size of King Lake.

13. Neither King Lake, Inc. nor the Harris Trust owned any real property in Gentry County, Missouri.

14. Prior to construction of King Lake, the watershed district obtained twelve easements from landowners in Gentry County.

15. Based on the as built plans of King Lake, the actual basin of King Lake at normal pool extends for a short distance into Gentry County, Missouri. At maximum flood pool, King Lake will grow to a size of 448 acres and will encroach on the property of many different owners in two counties.

16. The Harris Trust did not make any improvements to the property after its purchase from King Lake, Inc.

17. The sources of income for the Harris Trust from the King Lake property included farming income of approximately Twenty to Twenty-five Thousand Dollars ($20,000.00 to $25,000.00) per year, hunting club lease income of Five Thousand Dollars ($5,000.00) per year and boating club income of approximately Two Thousand Five Hundred Dollars ($2,500.00) per year.

The Court finds that the Trustee for the Christopher Harris Trust contemplated various economic uses of the King Lake property at the time it was purchased by the Trust, including a golf course, housing development and the generation of electricity. The Court further finds that the golf course and housing development proposals as contemplated by the Trust included the lake itself for recreational and aesthetic reasons. Mr. Harris had discussions with two possible developers but no formal plats or

plans for such a development were ever made. Mr. Harris investigated the concept of using the lake for the generation of electricity to sell "to the grid". King Lake was also used by the Harris Trust as a source for irrigation of surrounding crop land which increased the productivity of said crop land.

18. Prior to the purchase of the King Lake property by the Harris Trust, the Harris Trust had not:

A. Discussed the feasibility of commercially fishing King Lake with anyone involved in the commercial fishing business;

B. Conducted any actual studies of a commercial fishing operation on King Lake;

C. Contacted any governmental agencies concerning the possibility of commercially fishing King Lake;

D. Made any formal income and expense projections for a commercial fishing operation on King Lake;

E. Made any studies of a potential market for the fish being purchased from King Lake in a commercial fishing venture;

F. Contacted any commercial fishermen concerning a commercial fishing business on King Lake;

G. Consulted or contacted any bank or lender concerning an operating loan for a commercial fishing business on King Lake; and

H. Made any investment in commercial fishing equipment.

19. The Harris Trust did not engage in any of the items enumerated in subparagraphs 18(A) through 18(H) during the Harris Trust's first year of ownership of the King Lake property. The Harris Trust did not make any attempt to commercially fish the lake during the first year after its purchase from King Lake, Inc.

20. During the second year of ownership of the King Lake property by the Harris Trust, no commercial fishing feasibility studies were made, no contacts were made with commercial fishing operations to discuss development of commercial fishing on King Lake, no contacts were made with governmental agencies concerning commercial fishing possibilities on King Lake, no efforts were made to discuss operational loans with any lender, no investment was made in commercial fishing equipment and no attempt was made to commercially fish King Lake.

21. Until May or June of 1983, the only contact Mr. Brown Harris, II, Trustee had with anyone concerning a commercial fishing business consisted of a conversation with a Mr. Sal Marsalla. Mr. Marsalla is not in the commercial fishing business relating to the raising of fish for ultimate sale to a wholesaler or to the general public. The conversation with Sal Marsalla involved a discussion of the names of commercial fishermen who would remove fish from King Lake by netting.

22. During May or June of 1983, Brown Harris II had one or more telephone conversations with Mr. Larry Belusz, a state fisheries biologist with the Department of Conservation. As part of his normal duties, Mr. Belusz routinely handled inquiries from the public concerning

the taking of fish and commercial fishing operations. Mr. Belusz advised Mr. Harris that he could not commercially remove the fish from King Lake. Mr. Belusz mailed Mr. Harris a copy of the Wildlife Code in which he had highlighted the "waters of the state" definition. Mr. Harris disagreed with Mr. Belusz and indicated he intended to remove the fish from King Lake.

23. Sometime during May or June of 1983, Mr. Brown Harris, II, Trustee contacted Jackie Shields, who was a commercial fisherman. Mr. Harris made arrangements with Mr. Shields to remove fish from King Lake. In the early summer of 1983 Mr. Shields conducted a netting operation on King Lake which resulted in a taking of fish consisting mainly of "rough fish" such as carp. Mr. Shields sold the fish taken from King Lake and received checks from the purchasers. The checks were subsequently seized by Agent Kyle Carroll. The total amount which the Harris Trust would have received from this operation was less than $500.00.

24. Kyle Carroll was the DeKalb County Conservation Agent who had been stationed in DeKalb County since 1980. Agent Carroll routinely patrolled King Lake and the surrounding tract of land for wildlife code violations. In 1982, Agent Carroll issued a ticket to a Mr. Thornhill for fishing on King Lake without a license.

25. Based upon a report and information received from a member of the King Lake boating club, Agent Carroll conducted an investigation of an alleged fish netting operation on King Lake. The investigation led the agent to Mr. Jackie Shields, a commercial fisherman hired by the Harris Trust. Mr. Shields admitted he had taken

fish by netting from King Lake. Based upon information from Mr. Shields, Agent Carroll also reviewed the fish netting operation with Brown Harris, II.

26. The information from Agent Carroll's investigation was submitted to the DeKalb County Prosecutor who issued summons to both Mr. Shields and Brown Harris, II. Mr. Shields appeared at trial, was found guilty and paid a fine of approximately Three Hundred Dollars ($300.00).

27. The Harris Trust filed a declaratory judgment action in DeKalb County, Missouri in which it challenged the classification of King Lake as waters of the state. The declaratory judgment action was never pursued by the Harris Trust. The declaratory judgment action was eventually dismissed for lack of prosecution by the Circuit Court of DeKalb County, Missouri.

28. In May of 1984 the Harris Trust requested and was granted the right to appear before the Conservation Commission to make a presentation concerning King Lake. In the written request for the hearing, Mr. Brown Harris, II, Trustee, stated the Trust was looking for a quick and lasting settlement of the issues concerning King Lake. At the May, 1984 hearing before the Conservation Commission, the Harris Trust made a presentation and offered to sell the King Lake property to the Department of Conservation for One Million Dollars ($1,000,000.00). In a subsequent executive session, the Conservation Commission agreed to offer to purchase the property from the Harris Trust for Seven Hundred Fifty Thousand Dollars ($750,000.00). The Seven Hundred Fifty Thousand Dollars ($750,000.00) offer was accepted by the

Harris Trust and a standard real estate contract containing no reservation of rights was signed by the Harris Trust and the Department of Conservation.

29. Lost Creek and Willow Creek above King Lake are intermittent streams capable of sustaining and which do sustain fish populations.

30. Neither the Missouri Department of Conservation, King Lake, Inc. nor the Harris Trust stocked King Lake with fish prior to the purchase of King Lake by the Department of Conservation in 1984. Fish existed in King Lake prior to its purchase by the Department of Conservation in 1984. There is and was habitat for fish both above and below King Lake in Lost Creek.

31. Prior to and during the time the Harris Trust owned King Lake, fish could and did move to and from King Lake into Lost Creek above King Lake and out of King Lake into Lost Creek below the dam.

32. The fish found in King Lake during the time it was owned by the Harris Trust were native fish which originated in Lost Creek.

33. Such fish were subject to the rules and regulations promulgated by the Department of Conservation.

34. The use of rules and regulations promulgated by the Conservation Commission has enabled the Department of Conservation to develop and maintain a diverse and prosperous fish and wildlife population throughout the State.

35. The tourism industry within the State of Missouri has been enhanced as a result of the Department of

Conservation's use of rules and regulations to conserve and manage the fish and wildlife resources of the State.

36. The conservation and management of the fish and wildlife resources of the State through the use of rules and regulations has had a significant economic impact on the State as a whole.

37. The conservation and management of the fish and wildlife resources of the State through the use of rules and regulations has helped maintain the ecological diversity of the bio-mass of Missouri.

38. Without adequate rules and regulations for the conservation and management of the fish and wildlife resources of the State, the entire ecological system throughout the State could be jeopardized.

39. The use of rules and regulations for the conservation and management of the fish and wildlife resources of the State has helped protect the integrity of the natural environment of Missouri.

40. The rules and regulations of the Conservation Commission provide equal access for all Missouri citizens to hunting and fishing opportunities.

41. In bodies of water in which there is movement of fishes to and from waters of the state, the "waters of the state" regulation promotes substantial state interests by:

A. Enabling the Department of Conservation to enforce the State's rights and interests in and to fish and other wildlife titled in the state;

B. Maintaining appropriate fish populations throughout the state's inter-connected hydrological system;

C. Preventing the spread of disease among fish populations; and

D. Preventing the escape and expansion of exotic (non-native) fish populations within the water system throughout the state.

42. The Court finds that the proposal for commercial fishing on King Lake is highly speculative and not economically viable.

43. The Harris Trust had no reasonable expectation of commercially fishing King Lake at the time it purchased the property from King Lake, Inc. in 1980.

44. The Harris Trust purchased the King Lake property in 1980 for Six Hundred Twenty-one Thousand Dollars ($621,000.00) and without making any improvements to it, sold the property to the Department of Conservation in 1984 for Seven Hundred Fifty Thousand Dollars ($750,000.00).

CONCLUSIONS OF LAW

1. The essence of plaintiff's claim is that the application of the "waters of the state" regulation by the Missouri Department of Conservation to King Lake constituted a "taking" of property belonging to the Harris Trust because the regulation is invalid and does not advance a legitimate state interest. In *Harris v. Missouri Department of Conservation*, 755 S.W.2d 726, 731 (Mo. Ct. App. 1988) the Missouri Court of Appeals stated that:

> The landowner [i.e., the Harris Trust] should be allowed at an evidentiary hearing to show the regulation or condition on the land [i.e., the "waters of the state" regulation] did not serve some valid governmental purpose – for if the Commission's regulation prohibiting commercial fishing did not substantially advance a legitimate state interest, then a compensable taking has resulted. . . . In order for the commission to prevail it must prove that its regulatory provision furthered a substantial state interest.

This court now finds and concludes that the "waters of the state" regulation as applied to King Lake did and does advance and further a legitimate and substantial state interest. In so concluding, this court has weighed the public interests of the State of Missouri against the private economic interests of plaintiff and has also considered the nature of the state regulatory action involved, including whether physical invasion has occurred, the economic impact of the regulation and its interference with reasonable investment-backed expectations. *Keystone Bituminous Coal Assoc. v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). Two categories of regulatory action may be compensable without case-specific inquiry: those in which regulations compel the property owner to suffer a physical invasion of his property; and those in which the regulation denies all economically beneficial or productive use of land. *Lucas v. So. Carolina Coastal Council,* 505 U.S. ___, 120 L.Ed.2d 798, 812-813 (1992). The court finds that neither category applies in this case. After conducting case-specific inquiry, this court finds and concludes that plaintiff has not met its burden of proof and that the legitimate state interests

proven by the Missouri Department of Conservation at trial outweigh the private interests asserted by plaintiff.

2. The court finds and concludes that the "waters of the state" regulation was properly promulgated by the Missouri Department of Conservation pursuant to the power vested in it to issue rules and regulations regarding the taking of wildlife and fish in the state of Missouri. The constitution of the state of Missouri provides as follows:

> The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes in the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor . . .

The state interest involved is the "control, management, restoration, conservation and regulation of the . . . fish . . . of the state." In Article 4, §§ 40-46 of the Constitution mandate that such public interest be met and advanced. There is vested in the independent conservation commission created by Article 4, § 40, the administration of all laws pertaining to its mandate. Article 4, § 44 specifically provides for the enactment of laws to enforce the provisions of §§ 40-43, and § 45 provides for the issuance of rules and regulations by the commission to further its mandate.

The enabling statutes authorized by § 44 are primarily found in Chapter 252 of the revised statutes of the

State of Missouri. Mo. Rev. Stat. § 252.030 vests title in the State of Missouri to all the wildlife found within the state:

> 252.030. **Wildlife of Missouri – ownership and title.** The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, and hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this law or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wildlife; and any person who pursues, takes, kills, possesses or disposes of any such wildlife or attempts to do so, shall be deemed to consent that the title of said wildlife shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof.

Section 252.020(3) defines **"wildlife"** to include "all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification . . . " Anyone taking fish within Missouri is deemed to have consented that title to those fish remains with the state for the purpose of regulation. The public interest in the wildlife of Missouri extends to actual ownership of that wildlife. No private individual can assert rights of ownership or other rights to possess wildlife, and any taking by a private individual of wildlife is a matter of permissive grant conditioned upon the implied consent.

Such consent extends to all wildlife of and within the State of Missouri. *See, e.g., State ex rel. Wear v. Springfield Gas & Electric Co.*, 204 S.W. 942 (Mo. Ct. App. 1918)

(statute vests ownership of and title to fish in state without regard to character of stream or creek in which the fish may be). This consent extends to owners of private property on which wildlife may be found. *State v. Taylor*, 214 S.W.2d 34 (Mo. 1948) (the title of fish asserted by the statute to be in the state for purposes of preservation, propagation, and protection is not inconsistent with the qualified special property right of the owner of the land).

The statutory scheme also provides for the creation of the Department of Conservation and for the transfer of "all the powers, duties, and functions of the conservation commission to the department." Mo. Rev. Stat. § 252.002. Under such transfer, the statutory scheme further provides that

> No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by . . . [the] rules and regulations [issued by the department.]

Mo. Rev. Stat. § 252.040.

Under the enabling statutes, the Department of Conservation is explicitly granted the power to issue rules and regulations regarding the taking of wildlife and fish in the state of Missouri and to enforce such rules and regulations.

3. The court finds and concludes that the evidence adduced by the Department of Conservation at trial demonstrated that the public's interest in the control, management, conservation and regulation of fish and wildlife is advanced and furthered by the rules and regulations

issued by the Department, as specifically found at paragraphs 33 - 39, *supra*.

The court finds and concludes that such public interests have been met and served by the Department's regulatory scheme for many years. The court further finds and concludes that such public interests and their continued efficacy in the state of Missouri are further evinced by the direct support by the citizenry of Missouri of the Department through its approval of the one-eighth cent sales tax, as well as by the action of the Missouri legislature in affording the Department such regulatory authority as necessary to advance such interests.

4. The court takes judicial notice of 3 C.S.R. 10-11.805(39), which states as follows:

> **WATERS OF THE STATE:** All rivers, streams, lakes and other bodies of surface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two or more persons jointly or as tenants in common and including waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which are subject to movement of fishes to and from waters of the state.

Under Article IV, § 45 of the Constitution of the State of Missouri the rules and regulations of the Conservation Commission become effective ten (10) days after compliance with Article IV, Section 16 by filing the proposed regulation with the Secretary of State's Office. The Conservation Commission complied with the applicable rule

making requirements in promulgating the "waters of the state" regulation. 3 C.S.R. 10-11.805(39) was in effect in February 1980, when the Harris Trust purchased the property located in DeKalb County surrounding King Lake from King Lake, Inc.

5. King Lake was subject in February 1980 to the "waters of the state" regulation, as well as all other applicable regulations of the Missouri Department of Conservation, including 3 C.S.R. 10-4.110, which prohibits the release or liberation of fish or other wildlife to the wild except as specifically permitted by the Wildlife Code. The actions of Agent Kyle Harris in issuing the citations referred to *supra* were an application by him of regulations to an existing situation as authorized by statute. *See* Mo. Rev. Stat. § 252.080. The interpretation that King Lake was subject to "waters of the state" regulations was not the result of an arbitrary "declaration" by the Department of Conservation as argued by plaintiff. Rather, it was the result of the foreseeable application of general regulations to the conditions as they existed at King Lake when it was purchased by plaintiff.

6. The court finds and concludes that the "waters of the state" regulation makes clear the Department's jurisdiction over those bodies of water comprising as a whole the hydrologic system of the state of Missouri and in which the fish of Missouri are to be found. Substantial interests of the state of Missouri are served by the application of the "waters of the state" regulation to situations where there is movement of fishes to and from "waters of the state" including (i) enforcement of the state's rights in fish titled in the state, (ii) prevention of spread of disease in fish populations, (iii) prevention of the spread and

resulting proliferation of exotic species of fish in the hydrologic system managed by the state of Missouri, and (iv) maintenance of proper fish populations throughout the connected waterways.

7. The court finds and concludes that King Lake is connected to two feeder streams, Lost Creek and Willow Creek, to the north, which run at least intermittently during the year, and that overflow from the King Lake impoundment into Lost Creek below King Lake occurs throughout the year. The court finds that Lost Creek and Willow Creek above King Lake sustained native fish populations and that such fish populations were the source of the fish to be found in King Lake during the time it was owned by the Harris Trust. The court further finds that the fish populations of King Lake move freely into Lost Creek and Willow Creek and that fish populations routinely moved out of King Lake downstream. The court concludes that the fish in King Lake at the time the Harris Trust owned it were wild fish titled in the state of Missouri, that such fish were not confined to King Lake, that legitimate state interests existed and exist in controlling, managing, conserving and regulating those fish, and that the "waters of the state" regulation furthers and advances those state interests.

8. The court concludes that the "waters of the state" regulation reasonably promotes the objectives of the regulatory scheme of the Department of Conservation and the "waters of the state" regulation in particular. Missouri has specifically upheld and found constitutional fishing laws which classify territory, permitting fishing on one stream or in one territorial area and denying it in others.

State v. Terrell, 303 S.W.2d 26 (Mo. 1957). Such classification is permissible if the court finds and concludes that reasonable grounds exist for such classification, and this court does so conclude. The regulation reasonably includes bodies of water which are not entirely confined and located completely upon lands owned by a single person and also reasonably includes waters which have been stocked by the state or which are subject to movement of fishes to and from other waters of the state. This court finds and concludes that it is reasonable that bodies of water so defined should be subject to regulation by the Missouri Department of Conservation.

The statutory scheme under which the "waters of the state" regulation was propounded extends the regulatory authority of the Department of Conservation to fish located in all private bodies of water, such as ponds and lakes. The "waters of the state" regulation represents a narrowing by the Department of Conservation of such regulatory authority. This court finds and concludes that such narrowing is reasonable and, as set out below, is expressed clearly and definitely.

The precursor of the "waters of the state" regulation has previously been found to be reasonable and valid. In *Reid v. Ross,* 46 S.W.2d 567 (Mo. 1932) the landowner owned a large lake which was connected to the Missouri River by a drainage ditch one and one-half miles long. The lake and river were connected an average of twelve days each year. When they were connected, fish could pass from the river into the lake. On these facts, the Supreme Court of Missouri determined that the lake was "waters of the state" and that taking fish in the lake was subject to the regulations of the state governing such.

Accord State v. Lowder, 153 N.E. 399 (Ind. 1926) (if pond was so connected that in times of high waters fish could go from it to public waters and out again, pond was not private pond and regulations regarding taking applied); *People v. Lewis*, 198 N.W. 957 (Mich. 1924) (same); *People v. Horling*, 100 N.W. 691 (Mich. 1904) (same); *People v. Bridges*, 31 N.E. 115 (Ill. 1892) (same). This court similarly so concludes.

9. The plaintiff has argued that the Department has less restrictive alternatives available to protect fish life and satisfy its constitutional mandate. This court finds that the alternative proposals appear unworkable. One such alternative would eliminate the sentence, "[w]aters of the state will include any waters which have been stocked by the state or which are subject to movement of fishes to and from the waters of the state" from the regulation. This would eliminate the ability of the Department to manage fish within the connected system of water-ways which sustain the wild fish of Missouri. The other alternative proposed is that every body of water to be regulated be named by listing – an alternative that would lead to regulations hundreds of pages long subject to attacks for vagueness if not accompanied by lengthy and precise legal descriptions. This court finds and concludes that the department was and is under no obligation to adopt a less restrictive regulation and that this court should not undertake less restrictive alternative analysis in concluding whether a taking occurred. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987).

10. As noted above, in reaching its conclusions the court has balanced or weighed the public and private

interests involved. *Agins v. City of Tiberon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In conducting such analysis, this court finds and concludes that no physical invasion of the plaintiff's property has occurred. The non-physical regulation of wild fish belonging to the State of Missouri impinges far less upon the plaintiff's use of its property than regulations previously upheld by the Supreme Court. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 72 L.Ed. 568, 48 S.Ct. 246 (1928). Where no physical occupation of property occurred, the Supreme Court "has repeatedly upheld regulations that destroy or adversely affect real property interest." *Keystone*, 480 U.S. at 488, 94 L.Ed.2d at 490, n. 18, *citing Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 89 L.Ed.2d 166, 106 S.Ct. 1018 (1986); *Penn Central Transportation Co. v. New York City*, 438 U.S. at 125, 57 L.Ed.2d 631, 98 S.Ct. 2646; *East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 49 L.Ed.2d 132, 96 S.Ct. 2358 (1976); *Goldblatt v. Hemstead*, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926) (zoning regulations upheld); *Gorieb v. Fox*, 274 U.S. 603, 71 L.Ed. 1228, 47 S.Ct. 675 (1927) and *Welsh v. Swasey*, 214 U.S. 91, 53 L.Ed. 923, 29 S.Ct. 567 (1909).

11. The court finds and concludes that the plaintiff was not denied economically viable use of the property at issue by the department's application of the "waters of the state" regulation. Commercial fishing of King Lake was one of several economic uses intended for the property by plaintiff. These uses as testified to by the plaintiff's Trustee included the following: (1) farming of the property surrounding the lake; (2) recreational uses of the property; (3) boating rights; (4) hunting rights; (5) sport

fishing rights; (6) real estate development; (7) golf course development; (8) generation of hydroelectric power; (9) generation of wind of electric power; and (10) irrigation. Where an owner possesses "a full bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. *Andrus v. Allard,* 444 U.S. 51, 65-66, 62 L.Ed.2d 210, 223 (1979); *Keystone Bituminous Coal Assoc. v. DeBenedictis,* 480 U.S. at 493.

The Court finds that commercial fishing constituted only a very small portion of the Trust's plans for use of the property and that the plans for such fishing came as an afterthought when the Trust began experiencing financial difficulties. This court further finds and concludes that King Lake retained the vast majority of its economically viable use even though commercial fishing was prohibited and that no taking by the Missouri Department of Conservation occurred.

12. While the court does not reach a decision on damages, given the bifurcated trial agreed to by the parties, it is necessary for the court to consider the economic viability of the proposed commercial fishing of King Lake in conducting the case-specific inquiry referred to *supra.* The court finds and concludes that plaintiff failed to prove that its investment backed expectations as to commercial fishing were reasonable. The court finds that the plaintiff's expectations were highly speculative and conjectural. The proposed plan for commercial fishing of King Lake was experimental, untested and unproven. Plaintiff's plan called for raising large numbers of catfish and other fish in a polyculture operation in the 230 acres of water constituting King Lake. Plaintiff's expert witness

Jim Kahrs testified that there is no "track record" for such an operation and that he knew of no operation that size in this country raising catfish in a polyculture. Steven Waite, an expert witness for defendant, testified that the proposal was extremely speculative, that the rates of return projected by plaintiff were not believable or attainable, that fish of the size assumed in the plan could not be grown in the Northwest Missouri aquaculture season, that a feasible marketing plan was not developed, that he knew of no other private lake similar to King Lake in this country used for aquaculture as proposed by plaintiff, and that the entire proposal was unmanageable and not economically viable or feasible. The court notes that plaintiff's Trustee on cross-examination admitted that prior to the purchase of King Lake he did not investigate the feasibility of commercial fishing, as found by this court in paragraph 17, *supra*. The court therefore finds and concludes that the plaintiff failed to show that its investment expectations were more than unilateral or abstract and that plaintiff failed to prove at trial that its investment in King Lake was undertaken in order to further a commercial fishing operation. The court further finds that plaintiff's expectations as to the value of commercial fishing on King Lake were not reasonable and were not proven at trial. The court notes that plaintiff purchased the property in early 1980 for the sum of $621,000.00. and sold it in 1984 for $750,000.00 without making any improvements to the property. The court finds and concludes that any expectations of the plaintiff as to any value of the property beyond $750,000.00 are indistinct, unreasonable, speculative and unproven.

13. The court concludes that the "waters of the state" regulation was not proven by the plaintiff to be so indefinite and uncertain as to be constitutionally void for vagueness. A regulation is presumed constitutional and will not be held otherwise unless it clearly and undoubtedly contravenes some constitutional provision. *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. 1980). If terms or words used in a regulation are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement of definiteness and of certainty. A statute will be found void only if the statutory terms are of such uncertain meaning or so confused that courts cannot discern with reasonable certainty what is intended. *Id.* Further, in conducting such inquiry, absolute certainty or impossible standards of specificity are not required. *State v. Crawford*, 478 S.W.2d 314, 317. On a-challenge to a regulation as being unconstitutionally vague, it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing, but rather, the language is to be treated by applying it to the facts at hand. *Prokopf* at 824. Under these principles, the Department's regulation is not vague, indefinite, uncertain, or confusing.

The provision at issue states that waters "which are subject to movement of fishes to and from waters of the state" are also "waters of the state". This provision contains no confusing terms and is understandable to persons of ordinary intelligence. The regulation sets up a uniform standard for determining what bodies of water constitute "waters of the state." A court can discern with reasonable certainty what is intended.

The evidence at trial demonstrated at the time the Trust purchased King Lake (a) that Brown Harris II, Trustee of plaintiff, knew that the lake contained wild fish, (b) that King Lake was connected a significant portion of the year to Lost Creek and Willow Creek above King Lake, (c) that fish commonly move about within connected bodies of water, (d) that overflows regularly occurred out of King Lake into Lost Creek downstream and that fish escaped from King Lake into Lost Creek, and (e) that Lost Creek and Willow Creek were totally typical northwest Missouri streams, sustaining within them typical wild fish species observed and abundant throughout the watershed in similarly situated streams. The evidence demonstrated that the plaintiff's trustee knew that fish existed in King Lake. Plaintiff's trustee also knew of the interconnectedness of Lost Creek and Willow Creek and King Lake. The regulation at issue was in place at the time the Harris Trust purchased King Lake. Plaintiff had constructive notice of the regulation. The court concludes that plaintiff had all the information necessary to determine whether King Lake was affected by the regulation at issue and that the regulation is clear enough and definite enough that a person of ordinary intelligence can read it and understand what conditions must be met in order for a body of water to be considered "waters of the state" and, particularly, whether King Lake would fall under its purview.

The plaintiff argues at length in its post-trial brief by use of hypothetical fact situations, arguing that because any body of surface water may potentially overflow and flow into another body of water that therefore all bodies of surface water in the state of Missouri down to water

running in street gutters is subject to the regulation. The court finds such hypothetical argument irrelevant. On a challenge to regulation as being unconstitutionally vague, the language is to be treated by applying it to the facts at hand rather than imagining extreme hypothetical situations in which the language used might be vague or confusing. *Prokopf* at 824. The court finds and concludes that the Department's regulation is sufficiently definite and certain when applied to the facts at issue in this case and to King Lake.

14. The court finds and concludes that the boundary of King Lake as defined by its basin extends into Gentry County and is not located completely on land owned or leased by the Harris Trust. It was uncontroverted that neither King Lake, Inc. nor the Harris Trust owned or leased any land in Gentry County. The watershed district obtained easements from landowners in both DeKalb and Gentry County. Twelve separate easements were obtained from landowners in Gentry County.

The boundary of a lake is defined by its basin. Based upon the as-built plans of King Lake, the actual basin of King Lake extends into Gentry County. The Harris Trust did not meet its burden of showing that King Lake was entirely confined on land owned or leased by the Harris Trust. In any event, the court's decision herein does not depend on the court's findings as to the boundaries of King Lake. King Lake is also "waters of the state" because it is subject to movement of fishes to and from waters of the state. 3 C.S.R. 10-11.805(39). See *supra*.

15. The court concludes that no "taking" of plaintiff's property occurred under either the Fifth Amendment of the Constitution of the United States or Article 1, Section 26 of the Constitution of the state of Missouri. Plaintiff has suggested that the Missouri rule as to what constitutes a taking is more liberal than the federal rule. The cases cited by plaintiff in its post-trial brief, however, do not support such a conclusion. *Broadwell v. City of Kansas*, 75 Mo. 213, 42 Am.Rep. 406 (1881), on which plaintiff primarily relies involves a physical invasion, in which large quantities of earth were rolled against plaintiff's house, the result of which was to crush in the wall and throw down the house. No physical invasion occurred in the instant case. *Broadwell* is consistent with federal takings law where compensation has been awarded to plaintiffs who suffer physical intrusions upon even a small portion of their property. In *Hamer v. State Highway Commission*, 304 S.W.2d 809 (Mo. 1957), also relied upon by plaintiff, the general statement is made that "while it is not always necessary that there be an actual physical taking of any part of property in order to have a taking or damaging thereof . . . it is necessary that there must be an invasion or an appropriation of some valuable property right which the owner has to the legal and proper use of his property . . . " *Id.* at 871. This court concludes that this statement is consistent with federal takings law, which holds similarly. This court further concludes that no case law or other authority brought to the court's attention by plaintiff indicates that state takings law is broader or more liberal than federal takings law. The court further notes that in *Harris v. Missouri Department of Conservation*, 755 S.W.2d 726 (Mo. Ct. App.

1988), the Court of Appeals cited in its analysis *Pennsylvania Coal Co. v. Mahon, Keystone Bituminous Coal Assoc. v. DeBenedictis, Goldblatt v. Hempstead, Penn Central Transportation Co. v. New York City, Kaiser Aetna v. United States, PruneYard Shopping Center v. Robins, Agins v. Tiburon* and *Nollan v. California Coastal Comm'n,* all leading Supreme Court cases construing the federal takings clause. This court has similarly relied on federal "takings" jurisprudence.

16. The court finds and concludes that Lost Creek and Willow Creek above King Lake are intermittent streams and as such are subject to the "waters of the state" regulation. The fact that these streams are intermittent does not mean that they do not sustain fish populations. The court finds that Lost Creek and Willow Creek did sustain fish life during the time the Harris Trust owned King Lake and that the species of fish found in King Lake and Lost and Willow Creeks moved between the lake and creeks. If the Department's jurisdiction was limited to a continuously running river, stream, or lake, the fish and wildlife species inhabiting intermittent streams would lack protection. Such a result would not be consistent with the regulatory authority vested in the Department of Conservation. The court notes that a similar conclusion has been reached regarding the Clean Water Commission's jurisdiction over intermittent streams. *See Hammack v. Missouri Clean Water Commission,* 659 S.W.2d 595 (Mo. Ct. App. 1983) (Mo. Rev. Stat. §§ 644.016(15) and 204.016(15) applicable to intermittent streams).

17. The plaintiff has argued in its post-trial brief that the Department of Conservation unconstitutionally

modified a statute by issuing the "waters of the state" regulation. The Department of Conservation presented evidence at trial regarding its adoption of the regulation. In that process, the "waters of the state" regulation was made compatible with another statute, Mo. Rev. Stat. § 204.016(15) which along with the other provisions, govern the Missouri Clean Water Commission. This court concludes that the Department properly promulgated its "waters of the state" regulation, explaining the purpose of the proposed regulation as follows:

> PURPOSE: This amendment defines "waters of the state" in order to clarify the meaning of the term as it applies to other rules of the Wildlife Code. The definition is compatible with the statutory language of section 204.016(15) of the Missouri Clean Water Law.

Volume 3, Mo. Admin. Reg., Number 6, Title 3, Div. 10, Ch. 11 (June 1, 1978)

There is no assertion in the Department's explanation of the rule that the Department of Conservation "borrowed" the definition of "waters of the state" in § 644.016(15). The term "waters of the state" in its application to wildlife and fish regulation predates the enactment of the Clean Water Act by over fifty years. The Department noted that portions of the proposed regulation were "compatible" with the definition for clean water purposes – but the Department did not indicate that it considered itself to be bound in any fashion by one of the resource materials it used in fashioning its regulation. The goals and mandates of the Department of Conservation and the Clean Water Commission differ, and the

additional sentence in the Department's regulation is necessary because of such difference. While pollutants naturally flow downstream, fish can migrate and move both upstream and downstream. Without the final sentence of the Department's regulation, fish titled in the State of Missouri could not be adequately protected. The court concludes that the "waters of the state" regulation did not unconstitutionally modify Mo. Rev. Stat. § 644.016(15).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the foregoing, judgment is entered in favor of defendant against plaintiff and plaintiff shall have no recovery against defendant on its petition herein; costs are taxed against plaintiff.

Dated this 9th day of July, 1993.

/s/ Randall R. Jackson
Randall R. Jackson, Circuit Judge

IN THE CIRCUIT COURT OF
DEKALB COUNTY, MISSOURI

Brown Harris II, Trustee for the Christopher Harris Trust, Plaintiff, v. The Missouri Department of Conservation, 901 N. Ten Mile Drive, Jefferson City, MO 65102, Defendant.	Case No. CV586-47CC (Filed Aug. 7, 1986)

PETITION FOR DAMAGES

COMES NOW, the Plaintiff, Brown Harris II, as trustee for the Christopher Harris Trust, and for his cause of action against Defendant, states and alleges as follows:

1. Plaintiff is the sole surviving trustee for the Christopher Harris Trust (the "Trust") dated July 14, 1975, and as such is entitled to bring this action on behalf of the Trust; Defendant is an agency of the State of Missouri empowered to sue and be sued in its own name.

2. On or about March 1, 1968, King Lake, Inc., a Missouri Corporation, granted unto the Soil and Water Conservation District of Dekalb County, an easement for the purpose of constructing a dam in the Grindstone Lost Muddy Creek Watershed located on its property. The dam was thereafter constructed resulting in the creation of a 230-acre private lake situated in the middle of the 888-acre tract of land owned by King

Lake, Inc. The lake and land are located in Dekalb County and said property is legally described as follows:

The North one-fourth of the Northwest Quarter (NW1/4) of Section 13; the South three-fourths of the Southwest Quarter (SW1/4) of Section 12, Township 60, Range 32.

The Northwest Quarter (NW1/4) of Section 12; the Northeast Quarter (NE1/4) of Section 12; the Southeast Quarter (SE1/4) of Section 12; the North Half (N1/2) of the North Half (N1/2) of the Southwest Quarter (SW1/4) of Section 12; the North Half (N1/2) of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE1/4) of Section 13; the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section 13; the North 20 acres, more or less, of the Southeast Quarter (SE1/4) of the Northeast Quarter (NE1/4) of Section 13; a tract of land described as beginning at a point 658 feet South of the North Quarter corner of Section 13; thence 1330 feet East, thence 1229 feet South, thence North 79° 12' West 660 feet; thence North 87° 55' West 688 feet, thence North along the quarter line 1087.7 feet to the point of beginning, containing 34.60 acres, more or less, all in Township 60, Range 32; and all of the South 74.34 acres of Lot 2 of the .Southwest Quarter (SE1/4) of Section 7, Township 60, Range 31.

Also Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section 18, Township 60, Range 31; thence South

1386 feet along the Section line, thence North 65° 30' East 147.6 feet; thence 407.88 feet East, thence North 36° 00' East 204.2 feet; thence North 1155 feet; thence 660 feet West to the point of beginning, containing 19.87 acres.

3. King Lake, Inc. operated the aforedescribed land and lake for recreational purposes until 1979, when it sold the entire property to the Trust for $621,000. Thereafter, it was the design and goal of the Trust to stock and operate a commercial fishing operation on such property.

4. In the early part of May, 1983, Plaintiff notified the Missouri Department of Conservation of its intent to commercially fish the property and to seek Defendant's assistance and knowledge in undertaking the same. However, Defendant, without a hearing or right to appear, declared that such lake was "water of the state" and fish could not be removed commercially therefrom without violating Chapter 252 of the Revised Statutes of Missouri and the rules and regulations of the Conservation Commission.

5. Plaintiff had a valuable property right in and to the fish operation proposed and undertaken on its property. Plaintiff's operation of a commercial fishing business therein was and is a legal and proper use of this valuable property right.

6. It was Defendant's design and goal to take from Plaintiff this property right without just and due compensation and without

due process of law. To further this objective, Defendant desired to acquire Plaintiff's property for the public at the lowest price possible with no regard for fair market value. Defendant, by and through its agent, Lawrence C. Belusz, a fisheries biologist, thereafter, caused a criminal charge to be instituted against Brown Harris II alleging the unlawful commercial fishing of the lake.

7. No condemnation proceedings under Chapter 523 of the Revised Statutes of Missouri were ever undertaken. Instead, after causing Plaintiff to suspend its fishing operation by the initiation of the criminal charges, and knowing that such suspension would cause financial distress to the Plaintiff, Defendant offered to purchase Plaintiff's property at a price below its fair market value.

8. As a result of foreclosure proceedings on the property instituted by the lienholder due to the cessation of funds from the fishing operation, Plaintiff was compelled to sell the property to Defendant at less than its fair market value in order to avoid the loss of Plaintiff's entire equity therein. Accordingly, on May 31, 1984 Plaintiff sold the property to Defendant for the sum of $750,000 in response to Defendant's "take it or leave it", non-negotiable offer.

9. The criminal charges against Plaintiff were dropped as Defendant had accomplished its goal of forcing Plaintiff to sell the property in question at below its fair market value. All of Defendant's actions were part

of a plan to acquire Plaintiff's property through inverse condemnation without paying fair and just compensation therefore.

10. The difference in the reasonable market value of Plaintiff's property as a whole before and immediately after Defendant's taking thereof was $1,250,000. Article I, §26 of the Missouri Constitution prohibits the taking of property for public use without just compensation. Plaintiff realleges and restates that Defendant, through the above mentioned plan and scheme, took Plaintiff's property for public use without just compensation therefor.

Wherefore, Plaintiff pays for a judgment in its favor against Defendant in the amount of $1,250,000, together with interest thereon from the date of the initiation of the criminal charges resulting in the taking of Plaintiff's property (August 17, 1983), plus such further legal and equitable relief as the Court deems just and proper.

LINDE THOMSON FAIRCHILD LANGWORTHY KOHN & VAN DYKE, P.C.

By: /s/ Robert B. Thomson
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ATTORNEYS FOR THE PLAINTIFF

IN THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI

BROWN HARRIS II, Trustee for the Christopher Harris Trust, Plaintiff, v. THE MISSOURI DEPARTMENT OF CONSERVATION, 901 N. Ten Mile Drive Jefferson City, MO 65102, Defendant.	Case No. CV387 538 CC Division 1

FIRST AMENDED PETITION

COUNT I – DECLARATORY JUDGMENT

COMES NOW Plaintiff, and for Count I of his First Amended Petition states and alleges as follows:

1. Plaintiff Brown Harris II ("Harris"), is the surviving trustee for the Christopher Harris Trust dated July 14, 1975 (the "Trust") and as such is entitled to bring this action on behalf of the Trust.

2. Defendant Missouri Department of Conservation (the "Department") is an agency of the State of Missouri operating under the Constitution and statutes of the State of Missouri and is empowered to sue and be sued in its own name.

3. On or about March 1, 1968, King Lake, Inc., a Missouri corporation, granted to the Soil and Water Conservation District of DeKalb County, an easement for the purpose of constructing a dam in the Grindstone Lost

Muddy Creek Watershed located on King Lake, Inc.'s property. The dam was thereafter constructed resulting in the creation of a 230-acre private lake (the "Lake") situated in the middle of the 888-acre tract of land (the "Surrounding Property") owned by King Lake, Inc. (referred to collectively, the Lake and the Surrounding Property shall be the "Property").

4. The Property is located in DeKalb County and is legally described on attached Exhibit A.

5. King Lake, Inc. operated the Lake and the Surrounding Property for recreational and farming purposes until 1979.

6. In 1979, King Lake, Inc. sold the Property to the Trust for $621,000. It was the design and goal of the Trust to stock and operate a commercial fishing operation in the Lake and to develop the Surrounding Property for residential and recreational development, farming, hunting, boating, hydroelectric power generation, wind power generation and solar power generation.

7. In early May, 1983, Plaintiff notified the Department of Plaintiff's intent to commercially fish the Lake and sought the assistance and knowledge of the Department in undertaking the same.

8. Thereafter, the Department, without providing Plaintiff a hearing or right to appear, declared that the Lake was "waters of the state" and fish could not be removed commercially therefrom.

9. Plaintiff had a valuable property right in and to the use of its Property, including the commercial fishing operation proposed and undertaken thereon.

10. Plaintiff's operation of a commercial fishing business was a legal and proper use of the Property.

11. The Department thereafter caused a criminal charge to be instituted against Harris, alleging the unlawful commercial fishing of the Lake.

12. The Department has never undertaken condemnation proceedings under the Revised Statutes of Missouri. Rather, after causing Plaintiff to suspend its fishing operation by the initiation of the criminal charges, and knowing that such suspension would cause financial distress to the Plaintiff, the Department offered to purchase the Property at a price below its fair market value.

13. As a result of the financial distress caused by the Department, Plaintiff was compelled to sell his property to the Department at less than its fair market value in order to avoid the loss of Plaintiff's entire equity therein through foreclosure.

14. On May 31, 1984, Plaintiff sold the Property to the Department for the sum of $750,000 in response to Department's "take it or leave it", non-negotiable offer.

15. The Department failed to proceed under the proper and exclusive method of acquiring the Property for public use as mandated by Section 67.880 R.S.Mo.

16. 3 C.S.R. 10-11.805(46) provides that:

> Waters of the state: All rivers, streams, lakes and other bodies of surface water lying within or forming part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two (2) or more persons

> jointly or as tenants in common and including waters of the United States lying within the state. ters of the state will include any waters which have been stocked by the State or which are subject to movement of fishes to and from waters of the state.

17. 3 C.S.R. 10-5.205, governing the permit requirements and exceptions for fishing operations, provides that:

> (1) Any person who pursues, takes, transports, ships, buys, sells, possesses or uses wildlife in any manner must first obtain the prescribed hunting, fishing, trapping or other permit, or be exempted . . . , with the following exceptions.
>
> * * *
>
> (L) Any Missouri resident who is the owner of land that wholly encloses a body of water, or any member of his immediate household, may fish without permit in those waters. In the case of corporate ownership, this privilege shall apply to those corporate owners whose domicile is on such corporate-owned land.

18. 3 C.S.R. 10-5.216 provides that:

> (1) The Commission may suspend, revoke or deny a permit or privilege for cause, but not until an opportunity has been afforded for a hearing before the Commission or its authorized representative.

19. The Lake does not constitute "waters of the state" and Defendant's action in so designating the Lake was unreasonable, arbitrary and capricious, and beyond Defendant's authority.

20. The designation of the Lake as "waters of the state" is unreasonable and does not further a legitimate state interest or promote the general health, safety and general welfare of the citizens of the State of Missouri and constitutes a denial of substantive and procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

21. Under the applicable statutes and regulations, Plaintiff was entitled to commercially fish the Lake even if designated as "waters of the state".

22. Through its actions, Defendant has damaged and taken Plaintiff's property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the Missouri Constitution.

23. The taking of Plaintiff's property directly and specially affected Plaintiff to its injury.

24. Defendant's actions are violative of substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that said actions were unreasonable, arbitrary and capricious and placed the burden of achieving the Defendant's alleged public purpose disportionately on this Plaintiff.

25. Defendant's actions are violative of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Defendant classified the Lake as "waters of the state", thereby depriving Plaintiff of the valuable property interest, without providing Plaintiff a hearing or opportunity to be heard.

26. Defendant, while acting under color of state law, has not designated as "waters of the state" bodies of water similarly situated to the Lake.

27. Such disparate treatment of Plaintiff in designating the Lake as "waters of the state" constitutes a denial of equal protection under the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

28. Such disparate treatment of Plaintiff in designating the Lake as "waters of the state" constitutes a denial of equal protection under the law, as guaranteed by Article I, Section 2 of the Missouri Constitution.

29. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for the order of the Court:

a. Declaring that the Lake does not constitute "waters of the state" under the pertinent statutes and regulations of the Department of Conservation.

b. Declaring that the Department of Conservation lacked the authority to designate the Lake as "waters of the state" or in the alternative, to prohibit the commercial fishing of the Lake.

c. Declaring that the Department did not acquire the Property in the exclusive manner mandated by Section 67.880 R.S.Mo.

d. Declaring that the Department of Conservation took Plaintiff's Property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and damaged said property without just compensation in violation of Article I, Section 26 of the Missouri Constitution.

e. Declaring that the Department of Conservation's actions were arbitrary, capricious and unreasonable and a denial of substantive due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

f. Declaring that the Department of Conservation's actions were a denial of procedural due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

g. Declaring that the Department of Conservation's designation of the Lake as "waters of the State" is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

h. Declaring that the Department of Conservation's designation of the Lake as "waters of the State" is a denial of equal protection of the laws as guaranteed by Article I, Section 2 of the Missouri Constitution.

i. Awarding Plaintiff reasonable attorneys' fees and costs.

j. For such other and further relief as this Court may deem just and proper.

COUNT II

Compensation for Taking and Damaging

COMES NOW Plaintiff, and for Count II of its First Amended Petition, states and alleges as follows:

1. Plaintiff realleges and incorporates by reference all of the allegations contained in Count I hereof, as if set forth herein in full.

2. Defendant, through its classification of the Lake as "waters of the state" and subsequent actions taken in furtherance of its plan to acquire the Property for public use without providing compensation to Plaintiff has effected a taking or damaging of Plaintiff's Property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the Missouri Constitution.

WHEREFORE, Plaintiff prays for an order of the Court:

a. Awarding Plaintiff such compensation from Defendant as will compensate Plaintiff for the taking and damaging of the Property.

b. Awarding Plaintiff reasonable attorneys' fees and costs.

c. For such other and further relief as this Court may deem just and proper.

COUNT III

Damages for Violation of 42 U.S.C. Section 1983

COMES NOW Plaintiff, and for Count III of its First Amended Petition, states and alleges as follows:

1. Plaintiff realleges and incorporates by reference all of the allegations contained in Counts I and II hereof, as if set forth herein in full.

2. Defendant's arbitrary and unreasonable classification of the Lake as "waters of the state" and subsequent action to acquire Plaintiff's Property for public use, which was done under color of state law, official regulations, customs, usages, statutes, and regulations of the State, are a violation of Plaintiff's rights, privileges, and immunities as guaranteed by the United States Constitution and laws, specifically:

a. That Defendant has taken Plaintiff's Property without just compensation, in violation of the Fifth Amendment of the United States Constitution;

b. That Defendants have denied substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;

c. That Defendants have denied procedural due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;

d. That Defendants' actions are a denial of equal protection under the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Remedies for such violations of Plaintiff's civil rights are provided by Article 42, United States Code, Sections 1983 and 1988.

WHEREFORE, Plaintiff prays for the order of the Court:

a. Awarding Plaintiff such damages from Defendant as will compensate Plaintiff for Defendant's violation of Plaintiff's constitutional rights as set forth above, including compensation for the taking of Plaintiff's Property.

b. Awarding Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

c. For such other and further orders as this Court may deem just and proper.

Respectfully submitted,

BART L. STROTHER

By: /s/ Bart L. Strother

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POLSINELLI, WHITE, VARDEMAN
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A PROFESSIONAL CORPORATION

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ATTORNEYS FOR PLAINTIFF
BROWN HARRIS II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 1 day of July, 1992 to:

Ms. Jane Smith
P. O. Box 180
Jefferson City, MO 65102

Mr. Stephen J. Briggs
Mr. Creath S. Thorne
Morton, Reed & Counts
320 Robidoux Center
St. Joseph, Missouri 64501

ATTORNEYS FOR DEFENDANT MISSOURI
DEPARTMENT OF CONSERVATION

/s/ Timothy J. Sear

EXHIBIT 1

The North one-fourth of the Northwest Quarter (NW1/4) of Section 13; the South three-fourths of the Southwest Quarter (SW1/4) of Section 12, Township 60, Range 32.

The Northwest Quarter (NW1/4) of Section 12; the Northeast Quarter (NE1/4) of Section 12; the Southeast Quarter (SE1/4) of Section 12; the North Half (N1/2) of the North Half (N1/2) of the Southwest Quarter (SW1/4) of Section 12; the North Half (N1/2) of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE1/4) of Section 13; the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of Section 13; the North 20 acres, more or less, of the Southeast Quarter (SE1/4) of the Northeast Quarter (NE1/4) of Section 13; a tract of land described as beginning at a point 658 feet South of the North Quarter corner of Section 13; thence 1330 feet East, thence 1229 feet South, thence North 79° 12′ West 660 feet; thence North 87° 55′ West 688 feet, West 688 feet; thence North along the quarter line 1087.7 feet to the point of beginning, containing 34.60 acres, more or less, all in Township 60, Range 32; and all of the South 74.34 acres of Lot 2 of the Southwest Quarter (SE1/4) of Section 7, Township 60, Range 31.

Also Beginning at the Northwest corner of the Northwest Quarter (NW1/4) of Section 18, Township 60, Range 31; thence South 1386 feet along the Section line, thence North 65° 30′ East 147.6 feet; thence 407.88 feet East, thence North 36° 00′ East 204.2 feet; thence North 1155 feet; thence 660 feet West to the point of beginning, containing 19.87 acres.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BROWN HARRIS II, Trustee for the Christopher Harris Trust, Appellant,	)	WD 39,941
vs.	)	Opinion Filed:
MISSOURI DEPARTMENT OF CONSERVATION, Respondent.	)	August 16, 1988

APPEAL FROM THE CIRCUIT COURT OF
BUCHANAN COUNTY, MISSOURI

Honorable Merrill M. Steeb, Judge

BEFORE CLARK, P.J., LOWENSTEIN, J., AND FENNER, J.

This is a case for damages for inverse condemnation. It comes on for appeal following the granting of the dismissal of plaintiffs petition for failure to state a cause of action. The plaintiff is trustee for a trust which owns a 888 acre tract of land which (totally) encompasses a 230 acre lake. The petition alleges that in May, 1983, "Plaintiff notified the Missouri Department of Conservation of its intent to commercially fish the property and to seek Defendant's assistance and knowledge in undertaking the same. However, Defendant, without a hearing or right to appear, declared that such lake was 'water of the state' and fish could not be removed commercially therefrom without violating Chapter 252 of the Revised Statutes of Missouri and the rules and regulations of the Conservation Commission." The petition states the right to commercially fish the lake was a valuable property right

taken by the state without compensation. The petition continues: "It was the Defendant's design and goal to take from the Plaintiff this property right without just and true compensation and without due process of law. To further this objective, Defendant desired to acquire Plaintiff's property for the public at the lowest price possible with no regard for fair market value." The plaintiff went on to state the defendant Commission caused a criminal charge to issue for the attempt to commercially fish a state waterway.

There are additional twists to the case making it somewhat unusual. The Commission made no attempt to obtain the land under eminent domain, but, according to the trust, the denial of commercial fishing rights and the pressing of charges by the Commission was done to cause the trust financial distress, and "[A]s a result of foreclosure proceedings on the property instituted by the lienholder due to the cessation of funds from the fishing operation, Plaintiff was compelled to sell the property to Defendant at less than its fair market value in order to avoid the loss of Plaintiff's entire equity therein." Faced with foreclosure the dismissed petition states, it sold the land in response to a "take it or leave it non-negotiable offer by the Commission. So, in fact, the trust sold the property at below market value. It is for this difference that the trust prayed for damages of $1,250,000. The crux of the complaint is the Commission had "a plan to acquire Plaintiff's property through inverse condemnation without paying fair and just compensation." The trial court sustained the Commission's motion to dismiss for failure to state a claim.

The plaintiff, prior to this lawsuit, and without the aid of an attorney, filed a civil suit in United States District Court for a 42 U.S.C. Section 1983 action. The dismissal of federal suit was upheld in *Brown Harris II v. Missouri Conservation Commission*, 790 F.2d 678 (8th Cir. 1986), for the reasons the plaintiff could have requested state judicial review of the designation of the lake as state waters, and that they could have brought an inverse condemnation action in state court.

The issue of authority is important to any consideration of action by a state agency. The Missouri Constitution vests in the conservation commission:

> The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto. . . .

Missouri Const. Art. IV, § 40(a). "The Commission may acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for its purpose. . . . " Mo.Const. Art. IV, § 41. Missouri statutes create a department of conservation to be headed by the conservation commission. § 252.002.1, R.S.Mo. 1986. All the powers, duties and functions of the conservation commission have been transferred to the department of conservation. § 252.002.2.

In the same chapter, ownership and title to all wildlife of and within the state is declared to be in the State of Missouri. § 252.030. A person who fails to comply with or

violates this law or any such rules and regulations does not acquire any title, ownership or possessory right in wildlife, and any person pursuing, taking, killing, possessing or disposing of wildlife is deemed to consent that title to the wildlife remains in the State of Missouri for purposes of control, management, restoration, conservation and regulation. *Id.* No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by the rules and regulations. § 252.040. Wildlife includes fish. § 252.020(3).

Pertinent provisions of the Code of State Regulations are found at 3 C.S.R. 10. The Department of Conservation's definition of waters of the state:

> (44) Waters of the state: All rivers, streams, lakes and other bodies of surface water lying within or forming part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two (2) or more persons jointly or as tenants in common and including waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which are subject to movement of fishes to and from waters of the state.

3 C.S.R. 10-11.805. The permit requirements and exceptions of chapter 5:

> (1) Any person who pursues, takes, transports, ships, buys, sells, possesses or uses wildlife in any manner must first obtain the prescribed hunting, fishing, trapping, or other permit, or be exempted . . . , with the following exceptions.

* * *

> (k) Any Missouri resident who is the owner of land that wholly encloses a body of water or any member of his immediate household, may fish without permit in said waters. In the case of corporate ownership, this privilege shall apply to those corporate owners whose domicile is on such corporate-owned land.

3 C.S.R. 10-5.205.

> (2) A permit for the taking of wildlife may be issued only to an individual and may be used only by the individual to whom it is issued. . . . Miscellaneous and commercial permits which do not provide for the taking of wildlife may be issued to a firm, organization or partnership.
>
> * * *
>
> (4) The commission may suspend, revoke or deny a permit for cause, but not until the applicant shall have been afforded reasonable opportunity to be heard by the commission or its authorized representative.

3 C.S.R. 10-5.215. Under 3 C.S.R. 10.10, the basic requirement for persons commercializing in wildlife is that they possess the prescribed permit and keep records of their transactions available for inspection. 3 C.S.R. 10-10.705.

Questions concerning the Department of Conservation's authority to designate the subject lake as "waters of the state" and thereby prevent appellant's commercial fishing venture are evident from the Department's own rules. First, the definition for waters of the state excludes certain waters entirely confined and located completely upon land owned or leased by a single person or by two

or more jointly or as tenants in common. Second, the permit requirements (which may not be at issue here since it is not alleged a permit was applied for) include an exception for owners of land, including corporate owners, which wholly encloses a body of water. Here, the petition alleges a circumstance of total enclosure. It is not clear, however, from the rules what impact ownership of the land by the trust may have in terms of the waters of the state definition, or in terms of the permit requirement. What is clear is that the issue of the Department of Conservation's authority to designate the lake as "waters of the state" should be resolved at trial.

The issue in this case (assuming the Department of Conservation properly exercised its authority in its designation of the lake) is whether or not the plaintiff stated in his pleadings a cause of action for inverse condemnation.

The just compensation clause of the fifth amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for a public use without just compensation. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897). Moreover, the Missouri Constitution, at Art. I., section 26, also contains a similar just compensation clause. Under the fifth and fourteenth amendments a landowner has a right to challenge land use regulations by way of a suit for inverse condemnation. *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S.Ct. 2378 (1987). The inverse condemnation action, was originally conceived and developed, to give a landowner a remedy at law when a condemnor physically accomplished a taking or damaging of private property, (which was in result like an act of eminent domain) but which

was carried out with none of the procedure nor compensational requirements of an eminent domain procedure. 3 Nichols on Eminent Domain, § 8.1[4][a] (1978). Missouri courts recognize a cause of action for inverse condemnation where private property has been taken or has been damaged for public use. *Page v. Metropolitan St. Louis Sewer District*, 377 S.W.2d 348 (Mo. 1964). To state a claim for inverse condemnation, a plaintiff must allege his property was taken or damaged by the state for public use without just compensation. *Mattingly v. St. Louis County*, 569 S.W.2d 251, 252 (Mo.App. 1978). The landowner does not have to show an actual physical taking of property, but must plead and prove "an invasion or an appropriation of some valuable property right which the landowner has to the legal and proper use of his property, which invasion or appropriation . . . directly and specially affect[s] the landowner to his injury." *Roth v. State Highway Commission*, 688 S.W.2d 775, 777 (Mo.App. 1984) quoting *Hamer v. State Highway Commission*, 304 S.W.2d 869, 871 (Mo. 1957). The quintessential issue in this case is whether the act of the Department of Conservation in denominating the lake a state waterway, constituted a taking or a disturbance of a valuable property right belonging to the landowner which resulted in damage or injury.

On a motion to dismiss for failure to state a claim, the court assumes to be true all facts alleged by the petition, as well as all reasonable inferences deduced from those facts. *Shaw v. City of St. Louis*, 664 S.W.2d 572, 574 (Mo.App. 1983). The non-suited petition here states the Commission made an improper regulation which the landowner did not have time to contest in court due to

the financial hardship resulting from the regulation. It is alleged the circumstances forced the landowner to take less than market value in order to salvage something out of the property which was going to be foreclosed. The Commission defends this case on the grounds that the plaintiff failed to properly contest or appeal the regulation prior to bringing an action in inverse condemnation.

While some commentators draw distinctions between a cause of action for inverse condemnation and one for a taking by regulation under the police power, *see, e.g., Ragsdale, A Syntheses and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L.Rev. 213 (Winter 1987), others consider specific regulatory actions within the context of inverse condemnation analysis to determine the existence of a regulatory taking, *see, e.g.*, J. Shonkwiler & T. Morgan, *Land Use Litigation* (1986). What is clear, however, is that a landowner has the right to challenge land use regulation by way of a suit for inverse condemnation under both the federal and Missouri constitutions. *See generally*, 8 Nichols on Eminent Domain, § 14.07[1]-[3] (1988).

The United States Supreme Court has long recognized a regulation which goes too far is a taking. *Pennslyvania [sic] Coal Co. v. Mahon*, 260 U.S. 393 (1922). Police power actions which limit the use of private property can in certain instances constitute a de facto exercise under eminent domain with the landowner being entitled to just compensation. *Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S.Ct. 1232, 1247 (1987). There is no litmus test for determining whether there has been a taking. Rather, most determinations must be made on a case by case basis. *Hodel v. Virginia Surface Mining & Reclamation*

Assoc., Inc., 452 U.S. 264, 294-95 (1981); *Orion v. State of Washington*, 109 Wash.2d 621, 747 P.2d 1062, 1075 (banc 1987). The Supreme Court has eschewed set formulas for determining when a valid regulation ends and a taking begins, *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962), or "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court has applied a balancing test, with inquiry into factors including the economic impact of the regulation, its interference with reasonable investment backed expectation, and the character of governmental action. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Kaiser owned a private pond and had invested much money in dredging, and in developing the area into an exclusive marina and community open only to members. The United States sought to compel free public access to the marina because Kaiser had dredged a channel between the pond and "navigable water." The Supreme Court held for the landowner and found a taking, saying the regulation went beyond the ordinary regulation for navigation, and interfered with the landowner's "reasonable investment backed expectations." *Id.* at 178.

Not every destruction or injury to property by governmental action amounts to a taking in the constitutional sense. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). As noted, whether a governmental action constitutes a taking requires a determination of whether the public at large, rather than a single landowner, must bear the burden of an exercise of state power. *Agins v. Tiburon*,

447 U.S. 255, 260 (1980). A land use regulation reasonably related to promotion of the general welfare will not be deemed a taking just because there has been a diminution of property value. *Penn Central,* 438 U.S. at 133.

The petition here alleges facts, taken as true state a cause of action for a taking by the sovereign. The landowner should be allowed at an evidentiary hearing to show the regulation or condition on the land did not serve some valid governmental purpose – for if the Commission's regulation prohibiting commercial fishing did not substantially advance a legitimate state interest, then a compensable taking has resulted. *Nollan v. California Coastal Commission,* 107 S.Ct. 3141, 3148, at 3150 (1987). In order for the commission to prevail it must prove that its regulatory provision furthered a substantial state interest. The strictures of *Nollan* and *Kaiser* allow a landowner to present proof of a taking for which compensation is required. The trial court, by dismissing the suit precluded plaintiff from presenting proof of a taking. This ruling does not at this early stage attempt to assess the ultimate merits of the plaintiff's action, the court holds pleaded facts, which liberally construed, invoke principles of substantive law upon which relief may be granted. *Crest Communications v. Kuehle,* No. 69813, Slip Opinion at 12 (Mo.banc, July 26, 1988).

The Respondent Commission raises two bases for affirmance that are jurisdictional in nature. First is the contention that by conveying the property to the commission, appellant defeated any recovery under an inverse condemnation theory, presumably because of mootness. This court disagrees. Unlike the case relied on by the commission, *Shelton v. M & A Electric Power Cooperative,*

451 S.W.2d 375 (Mo.App. 1970), no agreement existed between the parties at the time of the designation, when the taking, if any, occurred. The *Shelton* court's apparent conclusion that an inverse condemnation would lie if property is taken or damaged without agreement or legal proceedings is inapplicable since the conveyance occurred *after* the challenged designation. Damages to appellant were suffered at the time of the improper designation. *Barr v. KAMO Electric Corp., Inc.*, 648 S.W.2d 616, 619 (Mo.App. 1983). The subsequent conveyance does nothing to negate the key allegation that the designation affected the taking of a valuable right in the property and devalued his property in the process. *Eldridge v. City of Palo Alto*, 57 Cal.App.3d 613, 129 Cal.Rptr. 575, 587 (1976). In any event, under the peculiar facts of this case it would be unfair to allow the state to take improper action which devalued the property, that led to an immediate foreclosure, resulting in a bargain sale to the wrongdoer.

Finally, the state asserts that because appellant did not directly challenge the designation, administratively or through a declaratory judgment action for instance, appellant was properly dismissed out of court. Again, this court disagrees. The provision on which appellant's claim is based, Art. I., § 26 of the Missouri Constitution, is self-enforcing and an action may be brought directly thereunder. *Roth*, 688 S.W.2d at 777. *See also*, 3 Nichols on Eminent Domain at § 8.4[4] (constitutional provisions are self-executing). In addition, the United States Court of Claims has allowed an inverse condemnation action even when judicial review of permit denial was not sought, *see*, *Jentgen v. United States*, 657 F.2d 1210, 1212 (1981).

The cause is reversed and remanded. No costs.

HAROLD L. LOWENSTEIN, JUDGE

All concur.

Supreme Court, U.S.
FILED
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No. 95-142

In The

Supreme Court of the United States

October Term, 1995

BROWN HARRIS II, TRUSTEE
FOR THE CHRISTOPHER HARRIS TRUST,

Petitioner,

vs.

THE MISSOURI DEPARTMENT OF CONSERVATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Missouri Supreme Court act properly in upholding the enforcement of regulations affecting wild fish owned by and titled in the State of Missouri?

II. Did the Missouri Supreme Court act properly in finding that a taking had not occurred where Petitioner failed to demonstrate that it had any reasonable investment-backed expectations?

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ADOPTION OF JURISDICTIONAL STATEMENTS

Pursuant to Rule 24.2, Respondent adopts Petitioner's statements of opinions below, jurisdiction, constitutional provisions, and appendix.

STATEMENT OF THE CASE

Constitutional and Statutory Authority for the Regulation of Wildlife and Fish Resources by the Department of Conservation.

Title to wildlife and fish within the state is vested exclusively in the State of Missouri. Mo. Rev. Stat. § 252.030. Section 252.030(3) defines "wildlife" to include "all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification. . . . " Anyone taking fish within Missouri is deemed to have consented that title to those fish remains with the state for the purpose of regulation. Mo. Rev. Stat. § 252.030.

In 1978, the Commission adopted 3 C.S.R. 10-11.805(39) which defines "waters of the state", thereby determining bodies of water falling under the jurisdiction of the Conservation Commission.

3 C.S.R. 10-11.805(39) states as follows:

> **WATERS OF THE STATE:** All rivers, streams, lakes and other bodies of surface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two or more persons jointly or as tenants in common and including

> waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which are subject to movement of fishes to and from waters of the state.

King Lake – Its Location, Construction, and Connection with Other Streams and Rivers.

King Lake is a part of the Grindstone-Lost-Muddy Creek Watershed District in northwest Missouri. Tr. 544. Lost Creek originates approximately two miles above King Lake. Pl. Ex. 44. Lost Creek continues below King Lake and eventually reaches the Grand River, which flows into the Missouri River. Tr. 158. King Lake was created by the construction of a dam across Lost Creek. Tr. 72. King Lake was not designed as a commercial fishing operation. Tr. 105.

King Lake is like most soil conservation lakes in that the original purpose of the lake was to control erosion. The size of the lake was increased to provide recreational opportunities. As a result of the dam across Lost Creek, a 230-acre lake was created. Def. Ex. 13 and 14. The dam which created King Lake contains a "drop tube" as well as an overflow spillway to release water. Tr. 90. Any such water flowing out of King Lake flows into Lost Creek below the dam and eventually into the Missouri River. Tr. 158.

Before construction on any watershed district lake project is initiated, it is necessary to obtain easements from all landowners who might be affected by the lake. Tr. 563. In the case of King Lake, that meant obtaining easements not only from King Lake, Inc. but also twelve

easements from residents in Gentry County. Tr. 564, Def. Ex. 1-12.

The purpose of obtaining such easements is to prevent future complaints or litigation by landowners based on the fluctuating size of King Lake. Tr. 563. It is undisputed that neither King Lake, Inc. nor the Harris Trust owned or leased any real property in Gentry County. All of the real property owned by King Lake, Inc. and the Harris Trust is located in DeKalb County, Missouri. Tr. 96.

Even at the normal pool shown on the as-built plans (Def. Ex. 13), King Lake extended into Gentry County. Tr. 561. The flood pool boundary as shown on the as-built plans clearly extended into Gentry County and is one of the reasons that additional easements were obtained in Gentry County. Def. Ex. 13.

The Source of and Movement of Fishes Between King Lake and Lost and Willow Creeks.

It is undisputed that neither the Conservation Department, King Lake, Inc., nor the Harris Trust stocked King Lake prior to the purchase of King Lake by the Conservation Commission in 1984. Tr. 95. Similarly, no one disputes that there were, in fact, fish in King Lake prior to 1984.

Dr. William Pfleiger, a witness for respondent who is recognized as Missouri's leading ichthyologist, (Def. Exs. 38, 39, 40, 41, 42), gave extensive testimony concerning the type, characteristics and habitat of fish native to streams like Lost and Willow Creeks. Tr. 782, 783, 802, 803, 807, 808, 810, 812, 813, 814. His opinion that the source of the fish found in King Lake was the fish in Lost

and Willow Creeks at the time the dam was erected was uncontroverted at trial. Tr. 816. Dr. Pfleiger also stated that the type of fish found in King Lake and Lost and Willow Creeks would move between the lake and the creeks above the lake. Tr. 816.

Lack of Investment-Backed Expectations.

The property previously owned by King Lake, Inc. and subsequently purchased by the trust consisted of approximately 888 acres of land. Tr. 219. While King Lake, Inc. owned the property, it was used for general crop farming and water fowl hunting. Tr. 78, 98. King Lake, Inc. sold the property to the Harris Trust in early 1980 for $621,000.00. Pl. Ex. 6.

The Trust did not make any improvements to the property after the purchase from King Lake, Inc. Tr. 287. The sources of income from the King Lake property included farming income of $20,000.00-$25,000.00 per year, hunting club lease income of $5,000.00 per year and boating club income of $2,500.00 per year. Tr. 220, 303.

Mr. Brown Harris, II trustee of the Harris Trust, testified that he thought the King Lake property had "numerous possibilities." Tr. 203, 204. These "possibilities" included a golf course, a housing development and the generation of electricity. Tr. 204. The golf course and housing development proposals would include the lake itself for recreational and aesthetic reasons. Tr. 312, 316. Although Mr. Harris had discussions with two possible developers, no formal plats or plans for such a development were ever made. Tr. 314. Mr. Harris

acknowledged that he did not think that commercial fishing would preclude a golf course/housing development from taking place. Tr. 313. He also testified that any actions taken by the Department did not prevent 1) use of King Lake for irrigation purposes, 2) use of the surrounding property for farming, 3) use of the lake by the boating club or 4) use of the property for hunting purposes. Tr. 317, 318.

Mr. Harris investigated the idea of using the lake for the generation of electricity. Tr. 316. The lake was also used by the Trust as a source for irrigation of surrounding crop land, thereby increasing its productivity. Tr. 315.

Prior to the Trust's purchase of the King Lake property, Mr. Harris had never been involved in a commercial fishing venture. Tr. 287. Mr. Harris admitted that prior to the purchase, he had not:

1. Discussed the feasibility of commercially fishing King Lake with anyone involved in the commercial fishing business;

2. Conducted any actual studies of a commercial fishing operation on King Lake;

3. Contacted any governmental agencies concerning the possibility of commercially fishing King Lake;

4. Made any formal income and expense projections for a commercial fishing operation on King Lake;

5. Made any studies of the potential market for the fish being purchased from King Lake in a commercial fishing venture;

6. Contacted any commercial fishermen concerning a commercial fishing business on King Lake;

7. Consulted or contacted any banker or lender concerning an operating loan for a commercial fishing business on King Lake;

8. Read any books concerning commercial fishing operations; or,

9. Made any investment in commercial fishing equipment. Tr. 287, 290.

Neither did the Trust engage in any of the above-referenced activities during the Trust's first year of ownership of the King Lake property. Tr. 290. No attempts were made by the Trust to commercially fish the lake during the first year after the purchase from King Lake, Inc. Tr. 290. Similarly, during the second year of ownership, no commercial fishing feasibility studies were made, no contacts were made with commercial fishing operations to discuss development of commercial fishing on King Lake, no contacts were made with governmental agencies concerning commercial fishing possibilities on King Lake, no efforts were made to discuss operational loans with any lender, no investment was made in commercial fishing equipment, and no attempt was made to commercially fish King Lake. Tr. 291, 292.

The only action which Mr. Harris undertook in the second year was to discuss the idea of a commercial fishing operation with his friends at work. This discussion with friends at work involved a concept of using a deep-fat fryer to fry the fish and sell to the public in

Kansas City, Missouri, a city approximately 90 miles from King Lake. Tr. 292.

Petitioner's commercial fishing expert, James Kahrs, testified that there was no track record for raising catfish in impoundments of 200 acres or more. Tr. 456. He further stated that such a plan would be speculative. Tr. 458.

Attempts by Plaintiff to Commercially Fish King Lake.

In May or June of 1983, Mr. Harris contacted Jackie Shields, a commercial fisherman and hired him to remove fish from King Lake. Tr. 295. Mr. Shields did remove fish from King Lake. Subsequently, the local Conservation Agent issued tickets to Mr. Shields and Mr. Harris in his capacity as trustee of the Trust.

In May of 1984, Mr. Harris requested and was granted the right to appear before the Conservation Commission to present his complaint. Pl. Ex. 48; Tr. 272. In his letter requesting this hearing, Mr. Harris specifically indicated he was looking for a "quick and lasting settlement" to the problem. Pl. Ex. 48. At the May 1984 hearing before the Conservation Commission hearing, Mr. Harris made a presentation and offered to sell the King Lake property to the Department for $1,000,000.00. Tr. 273. In a subsequent executive session, the Commission agreed to offer to purchase the property from the Harris Trust for $750,000.00. Tr. 278. This offer was accepted by the Trust and a standard real estate contract containing no reservation of rights was signed by the Harris Trust and the Department. Pl. Ex. 19. The contract also allowed the Trust to retain the benefits of the current farm crop located on the property. Pursuant to that contract, the Trust was paid

$750,000.00 in August of 1984 for the property which the Trust had purchased in early 1980 for $621,000.00 – a return of approximately twenty percent in less than a four-year period.

The Role and Effect of Regulations on the Management of Fish and Wildlife Resources.

Through rules and regulations, the Department of Conservation has developed and maintained a prosperous fish and wildlife population throughout the state. Tr. 650, 651. The enhancement of these populations has resulted in significant economic benefits for the State of Missouri. Def. Exs. 19 and 20; Tr. 662, 664, 665.

The "waters of the state" regulation was promulgated to clarify the Department's jurisdiction over those bodies of water in which the fish of Missouri are to be found. Def. Ex. 23. In those bodies of water in which there is movement of fishes to and from waters of the state, the waters of the state regulation promoted substantial state interests by:

1. Enabling the Department to enforce the state's rights and interests in fish and other wildlife titled in the state. Tr. 683, 685.

2. Maintaining appropriate fish populations throughout the state's inter-connected hydrological system. Tr. 674, 675.

3. Insuring that the shared aquatic environment within the state and the fish and wildlife resources associated with that environment are properly managed in a systematic way. Tr. 683.

REASONS FOR DENYING THE WRIT

In this case, the courts below found that the State of Missouri properly regulated the taking of wild fish owned by the State of Missouri. Petitioner was not deprived of substantial economic use of King Lake and had no investment-backed expectations in King Lake. The "denominator" issue was not raised below and is not presented by the facts of this case.

I. THE FACTS OF THIS CASE DO NOT PRESENT THE COURT THE OPPORTUNITY TO CONSIDER WHETHER DENIAL THROUGH REGULATION OF AN ECONOMIC USE OF A PORTION OF A PROPERTY CONSTITUTES A TAKING.

Petitioner claims that the Court should grant a writ of certiorari in this case so it might consider the "denominator" problem in arriving at a "deprivation" fraction to determine when economically viable use of property has been denied and regulatory taking has occurred. The facts of this case, however, will not support such consideration.

A. The Department of Conservation of the State of Missouri Only Sought Regulation of Wild Fish Titled in the State.

In Missouri, wildlife, including wild fishes, is titled in and owned by the State of Missouri. Mo. Rev. Stat. § 252.030; App. 30. The constitution of Missouri mandates that the state regulate the use and taking of such wildlife.

Mo. Const. Art. 4, §§ 40-46; App. 29. Such regulations have long been upheld by this court.[1]

---

[1] Mo. Rev. Stat. § 252.030 vests title in the State of Missouri to all the wildlife found within the state:

> 252.030. **Wildlife of Missouri – ownership and title.** The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the State of Missouri.

Section 252.020(3) defines "**wildlife**" to include "all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification. . . . "

Such ownership extends to *all* wildlife of and within the State of Missouri. *See, e.g., State ex rel. Wear v. Springfield Gas & Electric Co.*, 204 S.W. 942 (Mo. Ct. App. 1918) (statute vests ownership of and title to fish in state without regard to character of stream or creek in which the fish may be). Owners of private property on which wildlife may be found are *not* exempted and are deemed to have consented to the state's ownership. *State v. Taylor*, 214 S.W.2d 34 (Mo. 1948) (the title of fish asserted by the statute to be in the state for purposes of preservation, propagation, and protection is not inconsistent with the qualified special property right of the owner of the land).

This Court has found such vesting of ownership and its concomitant regulation of such property a proper and constitutional assertion of the state's authority. In *LaCoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924) this Court held as follows:

> The wild animals within [a state's] borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be required therein.

The trial court specifically found that the 230-acre lake was part of a natural watershed in northwest Missouri with natural streams flowing into it and overflow flowing out into other natural streams. App. 19. The trial court further found that the "fish found in King Lake during the time it was owned by [petitioner] were native fish which originated in Lost Creek [one of the natural streams]". App. 25.

The regulation of which petitioner complains did no more than permit the department to regulate the commercial taking of native fishes owned by the state. Strictly speaking, no property right of petitioner has been limited or restricted, since commercial fishing of native fishes not owned by petitioner was the only activity limited. The specific property in question – the wild fishes of Missouri – was the only property regulated, and petitioner was free to make use as it saw fit of the 230-acre lake.

Id. at 439. Similarly, in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928) this court held that

> the authority of the State to regulate and control the common property in game is well established . . . . [T]he State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people.

Id. at 153. *See also Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936) (state has supreme control over fish found within the waters of the state).

B. Petitioner Was Not Deprived of All Economic Use of the Lake Itself.

For a "denominator" issue to be present, there must exist a tract of land, a portion of which has been denied economically viable use by its owner through regulation. *See, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Thus, in *Loveladies Harbor, Inc.*, on which petitioner relies, the issue was whether a 12.5-acre plot, which had been denied a permit for development and lost thereby 99% of its value, should be considered as part of a larger 250-acre tract, other portions of which had been developed.

This factual pattern is not to be found in this case. The trial court specifically found that the petitioner was not deprived of other economic use of the 230-acre lake itself. The economic uses intended by petitioner for the lake itself included the following:

- boating rights;
- hunting rights;
- sport fishing rights;
- generation of hydroelectric power;
- irrigation.

App. 37-38.

The trial court also found that "commercial fishing constituted only a very small portion of the Trust's plans for use of the property and that the plans for such fishing came as an afterthought when the Trust began experiencing financial difficulties." App. 38. The trial court further found that "King Lake retained the vast majority of its

economically viable use even though commercial fishing was prohibited." App. 38. These specific findings by the trier of fact defeat petitioner's assertion to this court that it was denied all economic use of King Lake.

Further, the trial court followed the mandate of this court, *see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in conducting case-specific inquiry and in balancing the public interests of Missouri against the private economic interests of petitioner in light of the criteria set forth in *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987). The trial court specifically found that

> [N]o physical invasion of the plaintiff's property has occurred. The non-physical regulation of wild fish belonging to the State of Missouri impinges far less upon the plaintiff's use of its property than regulations previously upheld by the Supreme Court.

App. 37.

Thus, when there has been such limited regulation of a portion of property, the threshold requirements for consideration of a "denominator" issue have not been reached.

C. Petitioner Seeks to Bring Before This Court Error Not Asserted Before.

Petitioner now abandons before this court the theory of the case it argued below, as it seeks to transmute this case into one under which the "denominator" issue needs to be addressed. To do so, it now acknowledges the

validity of the regulation at issue and seeks to challenge the impact of the regulation. Pet. Brief at 13-14. This position is totally contradictory with the theory of the case adopted by the petitioner below. Previously, petitioner took the position that the Department's commercial fishing regulations were unconstitutionally vague and served no legitimate public interest. *See, e.g., Harris v. Department of Conservation,* 895 S.W.2d 66, 70-72 (Mo. Ct. App. 1995); App. 7-14. Petitioner's points on appeal to the appellate courts of Missouri did not raise the "denominator" issue. Accordingly, the issue has not been preserved for review by this court. *See Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) (ordinarily, Supreme Court does not decide questions not raised or resolved in lower court); *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (court will review questions not raised in court below only in exceptional cases); *California v. Taylor,* 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957) (same).

D. Petitioner Had No Investment-Backed Expectations in King Lake.

The "denominator" problem does not affect the holdings of this court that a central criterion of whether regulatory taking has occurred is the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64

L.Ed.2d 741 (1980); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). If petitioner had no reasonable investment-backed expectations, the "denominator" issue should not be reached.

In fact, the trial court found that "plaintiff failed to prove that its investment-backed expectations as to commercial fishing were reasonable." App. 38. Instead, the trial court found "that the plaintiff's expectations were highly speculative and conjectural [and that] the proposed plan for commercial fishing of King Lake was experimental, untested and unproven." App. 38. Thus, the trial court concluded "that plaintiff failed to prove at trial that its investment in King Lake was undertaken in order to further a commercial fishing operation." App. 39. The trial court also found as follows:

> [P]laintiff purchased the property in early 1980 for the sum of $621,000.00 and sold it in 1984 for $750,000.00 without making any improvements to the property. The court finds and concludes that any expectations of the plaintiff as to any value of the property beyond $750,000.00 are indistinct, unreasonable, speculative and unproven.

App. 39.

These findings were not found to be in error on appeal. The court of appeals also raised (but found it unnecessary to decide) the question of whether a sale at a profit could ever support a claim of interference with one's investment expectations. *Harris*, 895 S.W.2d at 69; App. 5. In short, petitioner's failure of proof at trial as to

investment-backed expectations should prevent this court from ever deciding any "denominator" issue in this case.

E. Missouri Does Not Grant a Property Interest in Wildlife to Owners of Private Property on Which Wildlife is Found.

As one of its reasons for this Court to grant certiorari, Petitioner asserts that a lake is a specific property interest which has been recognized and historically protected in Missouri. Pet. Brief at 14, 15. Petitioner's argument widely misses the mark.

The "property" at issue in this case is the wild fishes of Missouri. The State of Missouri does not grant a property interest in such wildlife to the owners of private property on or in which it is found. Missouri has a long and well established history of protecting and conserving the wildlife of the state.

Title to wildlife and fish within the state is vested exclusively in the State of Missouri. § 252.030 R.S.Mo. Anyone taking fish within Missouri is deemed to have consented that title to those fish remains with the state for the purpose of regulation. As found by the trial court such consent extends to all wildlife of and within the State of Missouri. *See, e.g.,* n. 1 *supra*. Such statutes protecting wildlife and regulating the taking of fish and game have long been a part of Missouri's statutory scheme. *See, e.g.,* Mo. R.S.A. § 8971.2., *et seq.*

The vesting of ownership of wildlife in the state has long been recognized by the courts of Missouri. In *State v.*

Heger, 93 S.W. 252 (Mo. 1906), the Missouri Supreme Court noted:

> The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the state, and that such is not the subject of private ownership.

Id. at 253. In further discussing the concept of ownership of wildlife vesting in the state, the *Heger* court cited *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1895). In the *Geer* case, Mr. Justice White stated:

> From the earliest traditions the right to reduce animals ferae naturae to possession has been subject to the control of the law giving power.

Id., 161 U.S. at 522; *See also* cases cited at n. 1, *supra*.

The trial court specifically found that the fish in King Lake were wild fishes and were titled in the State of Missouri. App. 34. Under the statutory scheme in effect in Missouri and the long-recognized doctrine of ownership of wildlife vesting in the State, Petitioner is deemed to have consented that title to the fish in King Lake remains with the State of Missouri for purposes of regulation.

Having so consented, Petitioner had no property interest in the fish being regulated by the State of Missouri. It follows, therefore, that regulation of the fish in King Lake by the State cannot lead to a compensable taking in favor of Petitioner.

Under the set of facts presented in this case, Petitioner's reliance on *Dennig v. Graham*, 59 S.W.2d 699 (Mo. Ct. App. 1933); *Bohanan v. Camden Bend Drainage District*, 208 S.W.2d 794 (Mo. Ct. App. 1948) and *City of Blue*

Springs v. Central Development Association, 831 S.W.2d 655 (Mo. Ct. App. 1992) is misplaced. *Dennig* involved a landowner who filed suit to enjoin the defendant from trespassing on his property. The landowner also annually stocked the stream in question with over 100,000 trout. The case did not involve the enforcement of any regulation of fish by the State of Missouri.

In the *Bohanan* case, the defendant drainage district had prepared a drainage plan which would virtually drain the lake at various times throughout the year. The plaintiff argued that such draining constituted a taking. As in *Dennig*, however, *Bohanan* did not involve regulation of wild fish by the State of Missouri.

Finally, the *City of Blue Springs* case on which Petitioner relies involved the condemnation of an *underground* water source. The issue decided by that court concerned whether the value of the underground water could be separated from the value of the land under which it flowed. The court concluded that "water is not severable from the land through or under which it flows." *Id.* at 659. Although the *City of Blue Springs* court did state that a landowner could convey his right to use the water, Pet. Brief at 15, it also held that the landowner could *not* convey the water itself. *Id.* The *Blue Springs* case did not involve wild fish or their regulation by the State of Missouri.

In summary, the cases cited by Petitioner do not address the issue of the regulation of wild fish by the State of Missouri and are readily distinguished on their facts. Petitioner had no property interest in or to the wild fish of the State of Missouri. Having no interest in such

fish, Petitioner has not suffered a taking by the state's regulation of its wildlife resources.

F. The Boundaries of King Lake Extended Beyond Ownership of Petitioner, Further Subjecting the Lake to State Regulation.

The trial court specifically found that petitioner did not show that "King Lake was entirely confined on land owned or leased by" petitioner. App. 42. This finding was upheld by the court of appeals. *Harris*, 895 S.W.2d at 70; App. 7. Thus, the lake was further subject to regulation by the department, since the lack of total ownership rendered it a "water of the state" pursuant to Missouri's Wildlife Code, 3 C.S.R. 10-11.805(39).

Such regulation was specifically found by the trial court to further "the department's jurisdiction over those bodies of water comprising as a whole the hydrologic system of the State of Missouri and in which the fish of Missouri to be found." App. 33. These specific factual findings support on alternate grounds the regulation by the department of commercial fishing of King Lake and alone would prevent any recovery by petitioner.

II. THE JUDGMENT OF THE MISSOURI SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner claims that the Missouri Supreme Court has placed itself in conflict with this court by holding that Missouri "will not find a taking so long as the regulation

advances a legitimate state interest regardless of the regulation's impact." Pet. Brief at 17.

Petitioner's claim is not supported by the record in this case, and Missouri has not so held. In the final portion of its opinion, the court below considered petitioner's claim that a taking occurred "because the application of the regulation denies Trust *all* commercial use of King Lake." *Harris*, 895 S.W.2d at 73; App. 14. The court below after first noting that it had already concluded that the regulation in question advances legitimate state interest, then turned to the question of deprivation of economic use. It concluded as follows:

> [T]he burden of proof is heavy on Trust to prove **all** economic use was denied. *Keystone* at 130-31. This Trust cannot do. Basically, the rule is as follows: where a landowner has a full "bundle" of property, the loss of one "strand" of the bundle is not a "taking" because a majority of the property remains. *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).
>
> Trust was not denied all economic use of the property, as there was evidence the commercial fishing use was only a small portion of the use of the property.
>
> The denial of the commercial fishing on King Lake was **not** the denial of all economic use of Trust's property, meeting the standards of *Keystone* and *Andrus*, respectively. Thus, there was no compensable "taking."

Harris, 895 S.W.2d at 73; App. 14-15 (emphasis in original).

This is the actual holding of the Missouri court on the issue of deprivation of economic use. It is not in conflict with decisions of the United States Supreme Court but, instead, succinctly summarizes existing law. Petitioner's claim must be denied.

Respectfully submitted,

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